No. 87-1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, and the INTERSTATE COMMERCE COMMISSION,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENT RAILWAY LABOR EXECUTIVES' ASSOCIATION

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QUESTIONS PRESENTED

1. Do Sections 2 First, 2 Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§ 152 First, 152 Seventh and 156, require a railroad to notify its employees of its decision to sell its rail lines for continued rail operations, where that sale would not preserve existing, collectively established, rates of pay, rules and working conditions?

2. Does the Railway Labor Act's status quo obligations prohibit the P&LE, until that carrier has complied fully with Section 6 of the Act, from selling its rail lines in such a way that the existing collective bargaining agreements will be terminated and the employees' existing rates of pay, rules, working conditions and employment relationships will be drastically changed?

3. Does the Interstate Commerce Act supersede the Railway Labor Act and relieve a rail carrier from its notice, bargaining and status quo obligations under the labor statute, where that carrier is participating in a corporate transaction subject to regulation by the Commission?

4. Do the federal courts have jurisdiction to enforce the notice, bargaining and status quo commands of the Railway Labor Act in a case involving a carrier which is participating in a corporate restructuring that the Commission has exempted from regulation under the Interstate Commerce Act?

5. Does the Interstate Commerce Act, and its grant of jurisdiction to the Commission to insure that a carrier participating in a corporate restructuring does not act in a manner contrary to the public interest as set forth in the transportation statute, restore to the federal courts the jurisdiction to enjoin peaceful strikes which Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 has withdrawn?

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IN THE

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Nos. 87-1589 and 87-1888

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
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This brief is respectfully submitted by respondent Railway Labor Executives' Association [hereinafter, "RLEA"] [1] in support of the Third Circuit's decisions and judgments in two separate proceedings involving the Pittsburgh & Lake Erie Railroad Company [hereinafter, "P&LE"].

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[1] RLEA is a voluntary, unincorporated association of the chief executive officers of nineteen labor organizations or divisions thereof, which collectively represent virtually all organized rail employees in this country. A list of RLEA's member organizations is attached to this brief as Appendix A; those organizations which represent P&LE employees are marked by an asterisk.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Besides those constitutional and statutory provisions identified by petitioner, respondent RLEA submits that the Commerce Clause of the Constitution of the United States (Art. I, § 8, cl. 3), Section 2 Seventh of the Railway Labor Act (45 U.S.C. § 152 Seventh), Section 11347 of the Interstate Commerce Act (49 U.S.C. § 11347), Sections 2, 8 and 13 of the Norris-LaGuardia Act (29 U.S.C. §§ 102, 108, 113), and Section 20 of the Clayton Anti-Trust Act (29 U.S.C. § 52) are also involved in these consolidated cases. These constitutional and statutory provisions are reproduced as Appendix B to this brief.

COUNTERSTATEMENT OF THE CASE

Petitioner P&LE is a relatively small rail carrier that was formed in 1875 and by 1987 operated a rail system that owned 182 miles of rail line extending generally from Youngstown, Ohio to Brownsville and Connellsville, Pennsylvania. The P&LE also had trackage rights to operate over another 190 miles of track owned by two other rail systems, extending to Buffalo, New York. Joint Appendix [hereinafter, "J.A."] at 21-22; *Field v. Allyn*, 457 A.2d 1089, 1091 (Del. Ch. 1983).[2] In addition to its track, facilities and related operating equipment, the P&LE owned a significant number of rail cars. *See*, J.A. at 82, 87. To operate that rail system, and to maintain its large car fleet, petitioner employed about 750 people in August 1987, approximately 650 of whom were represented by fourteen of RLEA's member organizations and were protected by various collective bargaining agreements covering rates of pay, rules and working conditions. J.A. at 82-83. Those agreements for many employees included "life-time guarantees" of employment with the P&LE. J.A. at 88.

[2] *Field v. Allyn* involved a class action by former minority shareholders of the P&LE concerning the 1979 transfer of ownership of the P&LE from the Penn Central Transportation Corporation to a group which includes the current Chief Executive Officer of the P&LE, Gordon E. Neuenschwander. J.A. at 79. That decision examines the P&LE's corporate history during the past few years.

In 1981, the P&LE began to experience financial difficulties, and at first, it turned to its employees to stem its losses by entering into agreements with many of its crafts for certain "concessions." For example, one craft reduced its employment from five days to four days a week; other crafts reduced wages by twelve (12%) percent. J.A. at 87-88; *e.g.*, J.A. at 202. Those concessions "were helful," but then "events overtook" the P&LE and it began to search for a different solution to its financial difficulties. J.A. at 87. That new solution was the sale of the rail lines for continued rail operations, but with the specific understanding that the new operator would not assume the existing collective bargaining agreements.

A. Proposed Sale Of The P&LE And Its Impact On Employees

Petitioner's owners considered selling the railroad to existing rail carriers, but those carriers, according to the P&LE's Chief Executive Officer, Gordon E. Neuenschwander, declined the offer "because of the extremely high cost of labor protection" which would have been required by Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347. J.A. at 90.[3] In order to enable the "own-

[3] Sales under the Interstate Commerce Act may be either "acquisitions" under 49 U.S.C. § 10901(a)(3), or "purchases" under 49 U.S.C. § 11343(a)(2), depending upon whether the purchaser is a "newly-formed" or existing railroad, with the latter type being labeled a "purchase." This distinction has become important because the primary difference between the two statutory provisions is that "purchases" are subject to mandatory employee protection under §11347, whereas the imposition of such protections is discretionary under § 10901. *See, Black v. ICC*, 762 F.2d 106, 116 (D.C. Cir. 1985). In 1982, the ICC decided that it would no longer impose employee protections in Section 10901 cases. *Knox & Kane*

ers of the P&LE Railroad . . . [to] get any value" from their investment (*id.*), the owners decided to structure any sale of the railroad so as to qualify for the class exemption which the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] had issued in January 1986 [4] and under 49 U.S.C. § 10505, exempting all newly-formed rail carriers from the prior approval requirements of 49 U.S.C. § 10901. J.A. at 81, 88-90. The advantage of that exemption was that the ICC had ruled in its *Ex Parte 392* decision that it would not impose any conditions on its exemptions to protect employees, unless on a petition to revoke the rail exemption under 49 U.S.C. § 10505(d), rail labor showed that there were "exceptional circumstances" justifying such benefits. *See, FRVR Corp.—Exemption—Acquisition*, ICC Finance Docket No. 31205, served January 29, 1988, *reviewed sub nom. RLEA v. United States*, 861 F.2d 1082 (8th Cir. 1988).

On July 8, 1987, the P&LE entered into an agreement with the Chicago West Pullman Corporation [hereinafter, "CWP"] transportation system [5] to sell the assets of the P&LE, except for certain real estate and approximately 6,000 rail cars, to a newly-formed subsidiary of the CWP system, P&LE Railco, Inc., for approximately $70 million. J.A. at 22, 80, 87. CWP intended "to fully operate the assets, which would be conveyed to the new company, as a railroad and maintain the same standard of service with much of the same equipment (the locomotives), as the current P&LE Railroad does today." J.A. at 80. Railco was to "continue on in the same way as the P&LE" was doing in July 1987, "[s]erving the same identical customers in Western Pennsylvania and Eastern Ohio, and even Northern West Virginia, that the P&LE does today." J.A. at 80. However, one major change which would occur as a result of the sale, was that Railco did not intend to assume or to apply the P&LE rates of pay, rules or working conditions. Rather, Railco intended to operate under entirely new rates of pay, rules and working conditions which would enable it to reduce its employment level to around 220 "agreement" employees. P&LE Brief at 13; App. to P&LE Supp. Brief on Pet. in No. 87-1888 at 1.

When rumors about the proposed sale began to circulate around the P&LE and appeared in several newspaper and television reports (J.A. at 70), the P&LE sent a letter to all of its employees, dated July 31, 1987, advising the employees that (J.A. at 29):

> [A]n agreement has now been reached with a subsidiary of Chicago West Pullman Transportation Corporation which, when finalized, would result in its purchase of all the P&LE's rail lines and operating properties. The transaction would also include the purchase of a substantial number of freight cars and all the P&LE's operating locomotives.
>
> There are a number of contingencies which remain before such a sale could be completed, and you will be provided with further details concerning the proposed transaction as additional information becomes available.

That letter was sent to the P&LE employees' representatives on July 30, 1987, along with a statement that in spite of "meaningful efforts" on the employees' part, "we are still faced with continued operating losses and increasing financial pressures. After very serious consideration by top management, it was decided that the proposed sale provided the best solution to the dilemma." J.A. at 70.

R.R.—Acquisition and Operation—Exemption, 366 I.C.C. 439 (1982).

[4] *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901* [hereinafter, *"Ex Part 392"*], 1 I.C.C.2d 810, 817 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table).

[5] CWP is a holding company which owned four Class III rail carriers, and formed Chicago West Pullman Transportation Corporation, which in turn owned two other new companies, P&LE Railco, Inc. and PC&Y Holdings, Inc. to acquire the P&LE assets in this case. J.A. at 110-11.

Rail labor responded to that letter by informing the P&LE that the proposed change in ownership, "obviously," would "have a significant impact on the working conditions of the P&LE employees" (J.A. at 71), and thus, is a proposed change subejct to the notice requirements of Section 6 of the Railway Labor Act, 45 U.S.C. § 156. *Id.* Rail labor also added that the individual organizations were "prepared to meet with the P&LE to negotiate concerning all aspects of this matter including, but not limited to, the decision to sell the rail lines and other assets of the P&LE and the effects of such a transaction on P&LE's employees . . . ." J.A. at 71-72.

Petitioner replied that it was willing to meet with the unions to *discuss* the anticipated sale, but that such a meeting would be without prejudice to its "position that 'Section 6' bargaining under the Railway Labor Act is not necessary or appropriate in this instance." J.A. at 74. According to the P&LE (*id.*):

> The anticipated transaction is controlled by the Interstate Commerce Act and is subject to the authority of the Interstate Commerce Commission. Section 6 bargaining, in the railroad's view, would usurp the ICC's authority over the transaction and management's prerogative to conduct the railroad's business as it sees fit.

Most, but not all, of the P&LE unions responded by serving notices on the P&LE under Section 6 of the Railway Labor Act "to negotiate . . . an agreement to ameliorate to the maximum extent possible the adverse impacts which the proposed sale of rail lines, operating properties and other assets will have on employees" represented by the labor organizations. J.A. at 35. Rail labor also filed a complaint on August 19, 1987, with the United States District Court for the Western District of Pennsylvania seeking a declaratory judgment concerning the P&LE's obligations under the Railway Labor Act and an injunction prohibiting the P&LE from selling its rail lines until it had complied fully with the labor statute's dispute resolution process. J.A. at 11.

Petitioner responded to the Section 6 notices by disputing the validity of the notices and once again rejecting any notion that it had an obligation to bargain over the sale or its impact on employees. J.A. at 76. However, petitioner added that it had "no objection to meeting" to *discuss* the sale and it suggested that the meeting be held on September 25, 1987. J.A. at 76-77, 91. Petitioner's Chief Executive Officer testified on September 16, 1987, that the P&LE was willing "to sit down and discuss the situation" with the unions, but it was not willing "to negotiate." J.A. at 91. According to Mr. Neuenschwander, the September 25th meeting was not to be a bargaining session, but rather was to be "an informational meeting only . . . , without prejudice to our position that we have no obligation to bargain that position." J.A. at 92.

When the P&LE failed to agree to meet before the sale would occur, rail labor withdrew its services from the P&LE on September 15, 1987. J.A. at 27, 69. Petitioner responded by seeking a restraining order, but on September 21, 1987, the district court, relying upon Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, denied petitioner's request.[6] J.A. at 2, NR 23.

In the meantime, Railco and the CWP corporate family filed a verified notice of exemption with the ICC on September 19, 1987, and on September 25, 1987, the ICC denied various requests by RLEA to stay the effectiveness of the exemption from Section 10901. Pet. in No. 87-1589 at E-1.[7] On October 5, 1987, petitioner renewed its re-

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[6] On September 17, 1987, rail labor and the P&LE entered into an agreement which temporarily resulted in the strike being called off. However, when the CWP system filed its notice of exemption on September 19, 1987, the agreement terminated and the strike was resumed. J.A. at 94-95, 98.

[7] RLEA asked the ICC to reject Railco's Verified Notice of Exemption or, alternatively, to stay the effectiveness of the exemption pending a ruling on the petition to reject. J.A. at 100. RLEA also filed a complaint with the ICC for a cease and desist order assert-

quest for a restraining order and a preliminary injunction (J.A. at 3, NR 31), and on October 8, 1987, the district court granted that request for an interlocutory injunction.[8] Pet. in No. 87-1589 at B-1.

Respondent RLEA appealed that interim injunction, and on October 26, 1987, the Third Circuit issued its opinion reversing the district court's injunction. Pet. in No. 87-1589 at A-1. According to the appellate court, Section 4 of the Norris-LaGuardia Act divested the district court of jurisdiction to enter the strike injunction, and therefore, it summarily reversed that order without considering either RLEA's argument under Section 8 of the anti-injunction Act or the P&LE's reliance on the Railway Labor Act. *Id.* at A-4, A-13. Petitioner P&LE had argued that the Interstate Commerce Act is "comparable to the Railway Labor Act and that, therefore, the prohibitions of the Norris-LaGuardia Act must be accommodated to the ICC's actions . . . ." *Id.* at A-7. That argument was rejected by the Third Circuit because it concluded that (*id.* at A-9):

> Neither 49 U.S.C. § 10901 nor 49 U.S.C. § 11347, the other provision relied on by P&LE which makes the ICC's authority "exclusive" with respect to combinations of carriers, contains any language which would suggest Congress intended to override the anti-injunction policy of Section 4 of the Norris-LaGuardia Act by the Interstate Commerce Act. The ICC's authority to consider the incidental effect of the transaction on labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanisms.

ing that the transaction was in reality one between two carriers and, thus, subject to 49 U.S.C. § 11343(a)(2). J.A. at 109. These requests were denied by the decision served September 29, 1987.

[8] Although denominated as a "temporary restraining order," the district court's strike injunction was not of a specific, limited duration, but rather, provided that it "shall remain in effect until this Court rules on the preliminary injunction sought by" P&LE. Pet. in No. 87-1589 at B-10. The court of appeals concluded that it had jurisdiction to review that order under 28 U.S.C. § 1292(a)(1). *Id.* at A-2 n.1. Respondent respectfully submits that this conclusion is correct. *E.g., Pan American World Airways, Inc. v. FEIA*, 306 F.2d 840, 843 (2d Cir. 1962).

C. No. 87-1888

Rail labor did not resume its strike against the P&LE once the Third Circuit vacated the injunction, but rather asked the district court to grant it summary judgment on its complaint.[9] J.A. at 4, NR 47. On November 23, 1987, the district court orally reaffirmed its earlier conclusion of law of October 8, 1987, that the "dispute between the parties . . . is a major dispute, *i.e.*, one involving a major change, affecting jobs, in an existing collective bargaining agreement." Pet. in No. 87-1589 at B-6; Pet. in No. 87-1888 at 83a. In particular, the court concluded that petitioner had "an obligation to bargain with the representatives of its employees concerning the effects of the sale, pursuant to Section [6] . . . of the Railway Labor Act." J.A. at 212. As the court subsequently explained, until the P&LE complied fully with the Act's bargaining procedures, it could not alter the status quo (Pet. in No. 87-1888 at 83a), which "consists of the rates of pay, rules and working conditions that prevail at the time a § 6 notice is filed." *Id.* Based on that ruling, the court ordered the P&LE to comply with the labor statute's major dispute resolution processes, and enjoined the carrier "from altering the rates of pay, rules and work-

[9] Rail labor's strike succeeded in bringing the P&LE to the bargaining table, although there was a question raised as to whether the P&LE was simply engaging in "perfunctory bargaining." J.A. at 161. On October 14, 1987, one of respondent's member organizations invoked the mediatory jurisdiction of the National Mediation Board [hereinafter, "NMB"] to mediate this dispute under 45 U.S.C. § 155 First. Pet. in No. 87-1888 at 73a.

ing conditions in existence at the time the § 6 notices were given." Pet. in No. 87-1888 at 85a. In particular, the court ordered that (*id.*):

> [T]he sale of . . . [the P&LE's] assets is enjoined to the extent that such sale does not include provisions for the maintenance of the status quo, that is, provisions prohibiting the alteration of the rates of pay, rules and working conditions existing at the time § 6 notices were given.

As the district court explained when it issued its earlier oral ruling: "As I indicated . . . , I was not enjoining the sale as such. The Railroad has every right to sell, as long as they maintain the status quo." J.A. at 213. That could be accomplished, the court indicated, by Railco agreeing to assume the employees, the collective bargaining obligations of the P&LE . . . ." *Id.*[10]

Petitioners appealed that ruling to the Third Circuit and on April 8, 1988, the appellate court, with one member of the panel dissenting solely on the conflict of laws

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[10] Although the record in this case does not contain any facts pertaining to the bargaining which has occurred since the district court's order, the P&LE has submitted factual statements to this Court on which it now relies to supplement the record in this case. Although RLEA takes strong exception to many of those non-record statements, especially to the inferences which petitioner seeks to draw (*see*, Letter by Counsel for RLEA to Clerk of this Court, dated December 6, 1988), RLEA stipulates that bargaining has occurred both under the auspices of the NMB and independently, in an attempt to find a solution to the pending disputes, and that NMB-sponsored mediation is currently being pursued.

Finally, RLEA respectfully submits that this Court can take judicial notice of the fact, as reported in *RLEA v. P&LE*, 858 F.2d 936, 938 n.1 (3rd Cir. 1988), that the sale agreement to Railco has terminated. However, since the injunction still applies to the P&LE and prevents that railroad from entering into any other sale arrangement which does not preserve the status quo during the Act's bargaining process, RLEA agrees that this case is not moot. *E.g., Powell v. McCormack*, 395 U.S. 486, 496 (1969).

issue, affirmed the district court. After examining the Railway Labor Act contentions of the parties, the court rejected the P&LE's argument that it did not have to bargain because it had a "right" to go out of business, and thus, its sale "would not violate the collective bargaining agreements . . . ." Pet. in No. 87-1888 at 16a. As the court observed (*id.* at 16a-17a; footnote omitted):

> The dispute in this case is not about the decision to sell the P&LE's rail lines; it is about the effects of that decision on the employees of the railroad. P&LE does not deny that the sale, as it is now structured, will lead to a substantial reduction in the workforce in the rail line. This loss of jobs by possibly two-thirds of the employees clearly would require a "change in agreements affecting rates of pay, rules, or working conditions." . . . Whenever a party intends to implement such a change, the RLA requires that the party submit to the major dispute resolution process, and not alter the status quo.

Relying upon this Court's decision in *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969), the court agreed with the district court's conclusion that the "actual, objective working conditions and practices, broadly conceived," which must be preserved, "plainly include the very existence of the workers' jobs." *Id.* at 18a. Judge Hutchison did not dissent from that ruling.

Petitioner's major arguments on its appeal were that the Railway Labor Act was superseded by the Interstate Commerce Act and, even if applicable, was made unenforceable by the ICC's exemption order. Those arguments were also rejected by the majority which stated (*id.* at 6a):

> We confess to finding the solution proposed by each party to be unsatisfactory. Dominating our thinking, however, is a reluctance to impinge on a congressional statutory mandate (the RLA) without a clear congressional authorization (and we find

none), or to find an implied repeal of the requirements of the venerable Railway Labor Act without an unavoidable conflict between the mandates of the two statutes (and such a conflict is not ineluctable). *See Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). We are particularly reluctant to find such a repeal here, where Congress has so recently addressed itself to deregulating the rail industry, yet has not chosen to relieve management of any of the onerous burdens imposed by the RLA. Moreover, because the Commission's approval of the transaction was merely permissive, we do not view an injunction against the sale as an attack on the ICC's order; and because the approval stemmed from a process in which labor's interests are only one of fifteen factors considered by the Commission, we do not believe that Congress intended that rail labor rely solely on the ICC for protection, to the exclusion of labor's rights under the RLA. For these reasons, we conclude that Congress did not intend the Commission's approval of the transaction without the imposition of substantive labor protective conditions to relieve the railroad of its obligation to comply with the exclusive congressionally-mandated RLA dispute resolution procedures.

SUMMARY OF ARGUMENT

Railroads have been expanding, contracting and going out of business virtually since the inception of the industry, and since 1920, those corporate restructurings have been regulated by the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* At the same time that Congress gave the ICC the power in 1920 to regulate rail expansions and abandonments, it also enacted a form of regulation of rail labor relations which, due to its gross failings, was replaced by the Railway Labor Act of 1926, 45 U.S.C. § 151, *et seq.* That labor statute, with certain modifications, is still in effect today. Although rail labor relations regulation has existed side-by-side with rail

economic regulation for almost seventy (70) years, there has not been a conflict between the two forms of regulation until recently when the ICC concluded in 1983 that it had exclusive jurisdiction over all labor relations matters arising from corporate restructurings which Congress has instructed it to regulate. This case arises from the P&LE's efforts to use the Commission's intrusion into the field of labor relations, as authority to sell its rail lines for continued rail operations *without* first complying with the notice, negotiation and status quo obligations of the Railway Labor Act.

I. This Court has observed in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), that rail labor has an absolute right under the Railway Labor Act to insist that a railroad bargain with it for an agreement to deal with the impact of corporate restructurings on employees. That bargaining is entirely proper even though it may "usurp" legitimate managerial prerogatives. Moreover, petitioner had an obligation under Sections 2 First, 2 Seventh and 6 of the labor statute to give its own notice of its intended actions, for its sale will change existing, collectively established, rates of pay, rules and working conditions.

II. In order to make the labor statute's collective bargaining processes effective, Congress has adopted a statutory scheme which requires both parties to a rail labor dispute not to change during the Act's bargaining process the "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 153 (1969). That obligation extends past the contractual rights of the parties and, instead, looks to the way in which the disputants have actually acted. Consequently, during the Act's bargaining period, petitioner must not sell its rail lines in such

a way that existing jobs are eliminated, or existing working conditions are changed.

III. While both the Railway Labor Act and the Interstate Commerce Act are forms of interstate commerce regulation by Congress, and together form an integrated, harmonious scheme, they are nevertheless distinct forms of regulation. For years, both forms of regulation have co-existed without conflict, and the sole reason that there now appears to be a conflict, is because the ICC believes that it is a labor board, with exclusive jurisdiction over all labor disputes arising from corporate restructurings within its regulatory control. That belief is erroneous, for the transportation statute is a form of minimum standards legislation, entirely distinct from a labor relations statute which fosters collective bargaining to resolve disputes. *Compare, United States v. Lowden*, 308 U.S. 225 (1939), *with, Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943). As their mutual, peaceful co-existence for almost sixty (60) years shows, the two Acts, when viewed properly, are not in conflict, and may be read so as to give effect to each, while preserving their sense and purpose. *Watt v. Alaska*, 451 U.S. 259 (1981). When viewed properly, neither Act overrides the other.

IV. Enforcement of the Railway Labor Act does not constitute a collateral attack on the ICC's exemption order, for the P&LE has not been enjoined from selling to Railco, nor has the injunction in any way set aside or suspended the exemption from regulation under the transportation statute which was accomplished by that exemption order. *Ex Parte 392* cannot be viewed as relieving the P&LE of its Railway Labor Act obligations, for Congress has not given the ICC that power and the ICC's order did not purport to grant such relief. In short, it was for the tribunal called upon to enforce the labor statute—*i.e.*, the district court—to determine in the first instance if the ICC's exemption order overrode the labor statute. *ICC v. BLE*, 482 U.S. —— (1987).

V. Besides being unable to establish that the Interstate Commerce Act makes it unlawful for rail labor to strike to compel a railroad to bargain, petitioner cannot show that the Interstate Commerce Act restores to the federal courts jurisdiction which the Norris-Laguardia Act has withdrawn to enjoin peaceful strikes. Since the transportation statute is not a labor statute, and since the dispute resolution process which the P&LE is attempting to foist upon rail labor is so one-sided, the strictures of the Norris-LaGuardia Act are not lifted by the transportation statute. *Burlington Northern R.R. v. BMWE*, 481 U.S. 429 (1987); *Order of Railroad Telegraphers v. Chicago & North Western Ry., supra.*

ARGUMENT

I. CONTRARY TO THE P&LE'S ASSERTIONS, THE RAILWAY LABOR ACT REQUIRES THAT IT NOTIFY AND BARGAIN WITH ITS EMPLOYEES' REPRESENTATIVES OVER ITS INTENTION TO SELL ITS RAIL LINES FOR CONTINUED RAIL OPERATIONS WITHOUT PRESERVING EXISTING RATES OF PAY, RULES AND WORKING CONDITIONS

Confidently asserting that the Railway Labor Act does not apply to its absolute right to change the direction and scope of its business, petitioner P&LE argues that it was not required by the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, either to notify its employees' representatives about, or to bargain with them over, its decision to sell its rail lines to Railco without preserving existing collective bargaining agreements. Petitioner also asserts that its managerial prerogatives immunized it from bargaining with the unions over any demands which would interfere with the expeditious implementation of its decision to sell. Those arguments, respondent RLEA respectfully submits, are without merit, for they are contrary to the plain language of the Railway Labor Act, to its legislative history, to the longstanding custom and

practice in this industry, and to this Court's decision in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960).

A. Petitioner's Reliance On NLRA Principles Is Misplaced

To support its assertion that managerial prerogatives, including in particular its quintessential prerogative "to go out of business," are not curtailed by the Railway Labor Act's bargaining processes, petitioner P&LE relies upon principles developed under the National Labor Relations Act [hereinafter, "NLRA"], 29 U.S.C. § 151, *et seq.*, which distinguish between "mandatory" and "permissive" subjects of bargaining and provide that some decisions which lie at the core of an employer's entrepreneurial control are not mandatory subjects of bargaining. Petitioner, joined by the *amici*, argue that those principles "translate with equal force" into the Railway Labor Act context (U.S. Brief at 17), but then they disagree amongst themselves over the result of that translation to this case. Depending upon their view of the related status quo concept, some *amici* argue that there is a duty on the P&LE's part to bargain over the impact of its decision to sell, while others assert that there is no such duty.[11] *Compare*, Air Con Brief at 4-12, and U.S. Brief at 17-21, *with*, NRLC Brief at 20-28.

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[11] For example, the National Railway Labor Conference [hereinafter, "NRLC"] takes the position that neither the decision to sell nor its effect on employees is a mandatory subject of bargaining under the Railway Labor Act, but the NRLC recognizes that under the Railway Labor Act, labeling "effects bargaining" as a required subject of bargaining would mean that the Act's status quo obligation would delay implementing the *sale* until bargaining over effects was completed. NRLC Brief at 26. Both the United States and the Airline Industrial Relations Conference [hereinafter, "Air Con"] assert that effects bargaining is appropriate, but erroneously view the Act's status quo obligations as applying solely to *contractual* rights. *E.g.*, U.S. Brief at 19-21, 23; Air Con Brief at 14-21.

Respondent RLEA respectfully submits that the reason for this diversity of opinion amongst the *amici* is that they, like the P&LE, are attempting to apply principles developed under one statutory scheme to another statute without a full appreciation of the crucial distinctions between the two statutes. Unlike the NLRA, the Railway Labor Act was designed to apply to a heavily *regulated* industry and was intended by Congress to prevent strikes by eliminating the need to strike. *E.g.*, *Burlington Northern R.R. v. BMWE*, 481 U.S. 429, 444, 451 (1987). To accomplish that primary goal, Congress adopted a dispute resolution scheme that imposes a *broad* bargaining obligation which is triggered by certain actions and carries with it an equally broad status quo obligation which restricts equally both management and employee rights during that bargaining process. *E.g.*, *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 574-75 (1971); *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 150 (1969). Because the focus of the NLRA is quite different, that statute's bargaining structure, including its reliance on the status quo concept to achieve its objectives, is materially different.[12] However, petitioner and the *amici* fail to appreciate these crucial differences.

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[12] Petitioner and several *amici* argue that the bargaining obligation under the NLRA is broader than that under the Railway Labor Act, and they support that argument by contrasting the term "working conditions" in Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, with "conditions of employment" in Section 8(d) of the NLRA, 29 U.S.C. § 158(d). That argument is frivolous, for it ignores the overall language of Section 2 First which requires the parties "to exert *every reasonable effort* to make and maintain agreements concerning rates of pay, *rules*, and working conditions, and to settle *all* disputes, whether arising out of the application of such agreements *or otherwise* . . . ." 45 U.S.C. § 152 First (emphasis added). Section 8(d)'s language is not as broad. Moreover, petitioner's reliance on Senator Wagner's reservations with the "Taft Bill" (*see*, 93 Cong. Rec. 3427-28 (April 11, 1947) (Remarks of Sen. Wagner)), is misplaced, for Senator Wagner's objection to the use of the term "working conditions" was but one part of an

This Court has *emphasized* on many occasions that principles developed under the NLRA "cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969) (footnote omitted); *see also, First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686-87 n.23 (1981). This case presents an excellent example of the need to heed that admonition.[13]

Petitioner's and the *amici*'s reliance on NLRA principles is misplaced here, for the two basic NLRA premises upon which the P&LE relies—*i.e.*, an employer has an absolute right to go out of business without delay, and an employer generally need not bargain over a de-

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objection to the language of a larger proposal that attempted to define in detail "collective bargaining" in a manner which the opponents opined would "limit narrowly the subject matters appropriate for collective bargaining." H. Rpt. No. 245, 80th Cong., 1st Sess. at 71 (1947) (Minority Report). As the House Minority stated in voicing that opposition (*id.*): "The appropriate scope of collective bargaining cannot be determined by a formula." Finally, the assertion that bargaining under the Railway Labor Act is *narrower* than bargaining under the NLRA is contrary to this Court's perception of that bargaining obligation. *See, First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 687 n.23 (1981).

[13] One reason why it is inappropriate to adopt for the Railway Labor Act the distinction between mandatory and permissive subjects of bargaining is that, unlike the NLRA, the Railway Labor Act does not have an "administrative [adjudicative] agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts." H. Rpt. No. 245, *supra*, note 12, at 71; *see, Chicago & North Western Ry. v. UTU*, *supra*, 402 U.S. at 580-81. Such an agency is clearly necessary to draw the subtle differences between mandatory and permissive subjects of bargaining.

cision to alter the basic scope of his business—do not apply to this case or, more importantly, do not apply to regulated industries such as railroads, where any railroad seeking to go out of business must obtain the prior approval of the ICC. *E.g.*, 49 U.S.C. § 10903.

To support its assertion that it has an absolute right to go out of business (something which it did not plan to do), petitioner relies upon this Court's decision in *Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965).[14] That reliance, however, is misplaced, for *Darlington*'s rationale does not apply to the Railway Labor Act. In *Darlington*, this Court stated that "so far as the . . . [NLRA] is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases," 380 U.S. at 268, but explained that it reached that conclusion because (*id.* at 270):

> A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act.

What petitioner and the *amici* ignore, however, is that the proposition that a railroad *could* go out of business whenever it wished, would have been a startling innovation in 1926, for it was an accepted fact when the Railway Labor Act was enacted in 1926, 44 Stat. 577, that a railroad's exit from the industry was limited by congressional regulation.

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[14] *Darlington* is of little comfort to the P&LE, since this Court observed in *Darlington* that when it was speaking of going out of business *entirely*, it was referring to a liquidation and not to the "sale of a going concern, which might present different considerations . . . ." 380 U.S. at 272 n.14. Here, the P&LE *was* being sold as a going concern; moreover, the P&LE was not dissolving. J.A. at 80, 87.

Railroads, almost from their inception and often at their own request, have been regulated, first by the States and then by the federal government. *See, Transit Comm. v. United States*, 289 U.S. 121, 127 (1933); Act to Regulate Commerce of 1887, ch. 104, 24 Stat. 379. By 1926, that federal regulation included restrictions on a railroad's ability to sell, merge, consolidate or abandon its lines without prior ICC approval. Transportation Act of 1920, ch. 91, 41 Stat. 456, 476-78, 480-82. Moreover, railroads were excluded from the class of persons who could take advantage of the bankruptcy laws, and even when railroads were permitted to take advantage of those laws in 1933 (ch. 204, 47 Stat. 1467, 1474), they were prohibited from liquidating.[15] *See*, S. Rpt. No. 95-989 at 12 (1978). As this Court explained in *Wilson v. New*, 243 U.S. 332, 347 (1917):

> That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business, and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and Federal, and is illustrated

[15] That restriction did not end until 1978 with the enactment of Section 1174 of the Bankruptcy Code by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2644. The reason for these early restrictions on railroads from being debtors under the bankruptcy laws was explained by the Court in *Continental Illinois National Bank v. Chicago, Rock Island & Pac. Ry.*, 294 U.S. 648, 671-72 (1935), as follows:

> A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities cannot be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become "insolvent or unable to meet its debts as they matured."

> by such a continuous exertion of state and Federal legislative power, as to leave no room for question on the subject.

Consequently, unlike an investor in a typical business subject to the NLRA, investors in the rail industry, "by their entry into a railroad enterprise[,] assumed the risk that" their interests would be subject to the public interest in continued rail service. *Reconstruction Finance Corp. v. Denver & Rio Grande Western R.R.*, 328 U.S. 495, 536 (1946).

When the Railway Labor Act and its legislative history are examined, it becomes clear that Congress, in furtherance of its legitimate power to regulate interstate commerce, adopted a labor dispute resolution scheme for the rail industry that strives to prevent interruptions to commerce by preventing the need to strike. *E.g., Burlington Northern R.R. v. BMWE, supra*, 481 U.S. at 451-52; *Detroit & Toledo Shore Line R.R. v. UTU, supra*, 396 U.S. at 150. To accomplish that objective, the Railway Labor Act imposes a deliberately long bargaining process and prevents both "the union from striking and management from doing anything that would justify a strike" during that bargaining process. *Detroit & Toledo, supra*, 396 U.S. at 150. By restraining both sides to the dispute from taking unilateral action to change the status quo, and by imposing a process which has built in delays before those restraints are lifted, Congress adopted in 1926 a statutory scheme which makes the threat of a strike or unilateral action almost irrelevant in creating bargaining leverage. Rather, the ability which the Act gives the party opposing the change to *delay*, creates that leverage and encourages the party proposing the change to compromise. *Id.*

The Act's bargaining and status quo obligations, thus, clearly impose restrictions on management's rights, but the drafters of these obligations deliberately imposed

those restrictions, relying upon Congress' power to regulate commerce to sanction those restrictions. *Hearings on S. 2646, Before Subcomm. of the Senate Committee on Interstate Commerce, 68th Cong., 1st Sess. at 18 (1924) (Statement of D.R. Richberg).*[16]

Petitioner and the *amici* center upon the delay inherent in bargaining under the Railway Labor Act, and argue that this Court's opinion in *First National Main-*

[16] This aspect of a railroad's existence is the death knell for petitioner's "taking" argument. P&LE Brief at 66-70. Petitioner acknowledges that "[b]ecause railroads are infused with the public interest, unlike other businesses they cannot unilaterally implement management decisions to expand or shrink their systems or go out of business, but must first obtain ICC approval." *Id.* at 35. Just as a reasonable delay in order to obtain prior ICC approval is permissible, and is not a taking under the Fifth Amendment, *e.g., Penn Central Merger Cases*, 389 U.S. 486, 511 (1968), so, too is a reasonable delay necessary to comply with the Railway Labor Act's regulation of commerce not a taking.

This Court has observed before that "whether a particular restriction will be rendered invalid [as a "taking"] by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). One such circumstance is "the extent to which the regulation has interfered with distinct investment-backed expectations" (*id.*), and, as this Court noted, a "taking" will be more readily found when there is a physical taking "than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id. Andrus v. Allard*, 444 U.S. 51, 64-68 (1979).

Here, the delay is necessary to enforce the Railway Labor Act's bargaining commands, which while long and drawn out, do have an end, and are designed to serve a legitimate governmental interest. *Accord, Texas & New Orleans R.R. v. Brotherhood of Railway Clerks*, 281 U.S. 548, 570 (1930); *Wilson v. New, supra*, 243 U.S. at 347-48. Consequently, the fact that complying with the Railway Labor Act may bring about an agreement which results in the P&LE's market value being less than that offered by Railco, does not turn this case into a taking. *Penn Central Transportation Co. v. New York City, supra.*

tenance immunizes the P&LE from bargaining over its *decision* to sell. There is no need, however, for this Court to decide in this case whether *First National Maintenance* should be made applicable to the Railway Labor Act, for this case does not involve "decision" bargaining. Rail labor is not arguing that the P&LE must bargain over whether it should sell, and if so, to whom.[17] Rather, rail labor has asserted and continues to maintain that when a railroad decides to sell its business in such a way that it does not preserve the existing rates of pay, rules, or working conditions of the employees who will be affected by that sale, that railroad is prohibited by Sections 2 First and 2 Seventh from doing so until it has first complied with the Act's bargaining process as set forth in Section 6. Moreover, the P&LE unions served their own Section 6 notices on petitioner to obtain agreements which would deal with the impact of such a sale on employees' rates of pay, rules and working conditions (*e.g.*, J.A. at 35, 38-39) and these notices independently triggered petitioner's obligation under Section 2 First to settle these disputes.

If this case were under the NLRA, petitioner would have violated Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), by not giving its unions "a significant opportunity to bargain about . . . matters of job security as part of the 'effects' bargaining mandated by § 8(a)(5)." *First National Maintenance, supra*, 452 U.S. at 681. Moreover, "under § 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time . . . ." *Id.* at 681-82. That has not occurred here, for during 1987 the P&LE did not provide the unions with any information about the details of the sale, the contingencies which must be

[17] During the bargaining which did occur, respondent RLEA, at the P&LE's request, did put forth an employee purchase proposal (J.A. at 158), but rail labor has not put that proposal into a formal Section 6 notice, nor has it refused to bargain over traditional effects proposals.

satisfied before there would be a closing, or what impact the sale would have on those crafts who would continue to perform work in connection with the property which the P&LE would continue to own and utilize (J.A. at 178-81, 185-86), even though rail labor specifically requested that information. *Id.*; J.A. at 31-34. In short, even if *First National Maintenance* applied to the Railway Labor Act, petitioner would have had an obligation to give notice and to bargain over the impact of the sale on employees.

However, this case is under the Railway Labor Act, and thus it is *to that Act and to its procedures* that this Court must look to determine whether petitioner has attempted to bargain in a "meaningful manner and at a meaningful time" over the impact of its decision to sell on employees.

B. The Railway Labor Act Required Petitioner To Bargain Over Rail Labor's § 6 Notices

As this Court has explained, the duty in Section 2 First of the Railway Labor Act "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise," is the "heart" of the Act. *E.g., Chicago & North Western Ry. v. UTU, supra*, 402 U.S. at 574. That duty clearly required petitioner to bargain with its unions over the notices which they served in August and September 1987 to negotiate for agreements which would give employees guaranteed employment, or pay, if deprived of employment. J.A. at 42. Those bargaining proposals, including the proposed penalty pay to prevent the loss of employment, clearly dealt with rates of pay, rules and working conditions and, as this Court explained in *Order of Railroad Telegraphers v. Chicago & North Western Ry., supra*, 362 U.S. at 338, are bargainable under the Railway Labor Act, even if they infringe upon management's prerogatives. The same is also true of rail labor's request that the P&LE obtain the buyer's commitment to assume all existing collective bargaining agreements, including the protective agreements which the unions were seeking to negotiate (J.A. at 42), for that proposal also dealt with rates of pay, rules and working conditions and was designed to implement the past practice in the rail industry that corporate transactions be accomplished in such a manner that existing collective agreements are preserved. *See*, 49 U.S.C. § 11347, incorporating 45 U.S.C. § 565(b); *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). While these proposals clearly infringe upon management's prerogatives to operate the business in the most economical manner, they are nevertheless entirely consistent with the purposes and scheme of the Railway Labor Act's bargaining processes.

In *Order of Railroad Telegraphers*, this Court was faced with a railroad's refusal to bargain with a union over its decision to close agency stations and to consolidate those agency functions. Moreover, the carrier also refused to bargain over a notice which the union had served under Section 6 of the Act seeking an agreement to prohibit the railroad from abolishing any agent's job "except by agreement." 362 U.S. at 332. In considering whether Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, deprived the federal courts of jurisdiction to enjoin a strike over the railroad's refusal to bargain, this Court addressed the question of whether the "union's effort to negotiate about the job security of its members 'represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations.'" 362 U.S. at 336, *quoting* court of appeals' decision. After examining the purposes of the Railway Labor Act *and* the Interstate Commerce Act as they relate to 'stable and fair terms and conditions of railroad employment" (362 U.S. at 330-31), this Court stated (362 U.S. at 338; emphasis added):

> In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. *It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.*

Respondent RLEA respectfully submits that the reasoning of that case is applicable here, for rail labor has sought throughout this litigation to influence the P&LE to preserve employment and the employment rights of its members to the maximum extent practicable, while at the same time assuring the continued viability of the P&LE or its successor. Rail labor's efforts to obtain through bargaining an agreement preserving the employment of P&LE employees is exactly the type of dispute which Congress intended to be resolved under the Railway Labor Act's bargaining process. Indeed, as respondent shows in Argument III, *infra*, Congress' intent on this point could not be clearer. Thus, the lower courts were correct in holding that rail labor's Section 6 notices triggered the P&LE's bargaining obligation under the Railway Labor Act.

C. The Railway Labor Act's Language And Its Legislative History Required Petitioner To Give Notice And To Bargain

Not only does the P&LE have the duty to bargain with rail labor over the Section 6 notices which the unions served, but the P&LE was also obligated by Section 2 First, 2 Seventh and 6 of the labor statute to serve its own Section 6 notice concerning the impact which its decision to sell would have on the existing collective bargaining agreements of its employees.[18] That notice obligation existed in this case because the P&LE intended to sell in such a way that it would effectively terminate the collective bargaining agreements of its employees.[19] *E.g., Burlingon Northern R.R. v. UTU*, 848 F.2d 856, 864 n.9 (8th Cir), *cert. denied sub nom. ICC v. BN*, Sup. Ct. No. 88-711 (November 28, 1988); *United Industrial Workers v. Board of Trustees*, 351 F.2d 183 (5th Cir. 1965).

Petitioner asserts that it did not have an obligation to give notice and to bargain about its proposed sale to Railco because its sale would not *violate* any existing agreement. P&LE Brief at 28-29. That argument is without merit, for as the court of appeals noted, the "loss of jobs by possibly two-thirds of the employees clearly would require a 'change in agreements affecting rates of pay, rules, or working conditions.'" Pet. in No. 87-1888 at 17a, *quoting* 45 U.S.C. § 156. Whether or not the proposed *change* would *violate* the agreements is entirely irrelevant, for the crucial inquiry which must be

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[18] Petitioner maintains that its sale would not terminate its agreements, because the P&LE would continue to honor any obligations which continued to exist. J.A. at 197. However, the P&LE also maintained that its existing job guarantees would *end* once it sold its assets. *Id.* Moreover, once the assets are sold it is clear that for all practical purposes the existing collective bargaining agreements, except for those covering crafts whose work will remain with the P&LE's corporate shell (*see*, J.A. at 178-86), will terminate. *See, Western Airlines, Inc. v. IBT*, 480 U.S. 1301 (1987) (O'Connor, J., in Chambers).

[19] Respondent RLEA is *not* asserting that the decision to sell triggered the P&LE's notice obligation. Rather, it was the decision to sell *in such a way* that existing agreements would effectively be terminated that triggered the notice obligation. For example, when the P&LE's current owners purchased the railroad in 1979, they did not change existing collective bargaining agreements (*see, Field v. Allyn, supra*), and thus, did not trigger the Act's notice obligation.

made under Section 2 First and 2 Seventh is whether the decision of management will adversely affect the collectively established wages or working conditions of employees who are represented by a union; if it will, the Act requires that notice be given.[20]

Sections 2 First and 6 of the Railway Labor Act were first enacted in 1926, but can be traced to Section 301 of the Transportation Act of 1920, *supra*, 41 Stat. at 469. That provision of the 1920 Act, imposed a non-enforceable duty upon labor and management "to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof." 41 Stat. at 469. *See, Pennsylvania Railroad System v. Pennsylvania R.R.*, 267 U.S. 203, 215-17 (1925). Rather than create judicially enforceable duties, the 1920 Act created a board composed of labor, management and public members (the Railroad Labor Board) to decide unresolved labor disputes, but relied upon only moral persuasion and public opinion to enforce the board's decisions. *Id.* That system, for a variety of reasons, proved to be a failure, and in 1924 rail labor proposed a bill (*i.e.*, the Howell-Barkley bill) which contained, with a few exceptions not relevant here,[21] Section 2 First and 6 of the 1926 Rail-

[20] Not all changes in established "rules or working conditions," however, give rise to the notice obligation, for Section 2 Seventh deals with rates of pay, rules or working conditions *as embodied in agreements*. Thus, if a working condition is not part of an agreement, either written or implied, notice need not be given. But, if the union seeks to bargain over that change by including it under the written agreement, Section 2 First requires bargaining and Section 6 requires that that practice not be changed during the Act's bargaining phase. *Detroit & Toledo, supra*, 396 U.S. at 152-54. In other words, the scope of the Act's status quo obligation is *broader* than the scope of Section 2 Seventh's notice requirement.

[21] Section 2 of the Howell-Barkley bill, with minor word changes, became Section 2 First in 1926 and has not been modified since.

way Labor Act. *See*, H.D. Wolf, THE RAILROAD LABOR BOARD at 407-15 (Univ. of Chicago Press 1927); *see*, S. 2646, 68th Cong., 1st Sess. (February 28, 1924). Rail labor's statements to Congress explaining that bill, RLEA respectfully submits are thus highly relevant in construing the intent of those provisions of that bill which were subsequently agreed to by management, and adopted by Congress as the Railway Labor Act. *See*, THE RAILROAD LABOR BOARD at 414-16.

In March and April 1924, representatives of rail labor testified before a subcommittee of the Senate Committee on Interstate Commerce to whom the Howell-Barkley bill had been referred, and explained that their proposal was essentially "an industrial code for the railroads made up from the written and unwritten laws that have governed industrial relations on the railroads for many years." *Hearings on S. 2646, supra*, at 16 (Statement of D.B. Robertson). One such existing "law" was *Decision No. 119* of the Railroad Labor Board, 2 R.L.B. Dec. 87 (1921), in which the Board promulgated certain "principles" with which it opined all collective agreements should be consistent. 2 R.L.B. Dec. at 91. As relevant here, one of those principles was that: "The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management." Id. at 96.[22]

Section 6(A) of the 1924 bill became Section 6 in 1926 with one change; a sentence dealing with joint conferences was added as the second sentence of the 1926 Act (44 Stat. at 582), but was deleted in 1934. Section 6, as it exists today, was also amended in 1934 when Congress added the words "in agreements" to the first sentence. *See*, pages 35-36, *infra*.

[22] That "principle" read in its entirety as follows (2 R.L.B. Dec. at 96):

> 7. The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management. This right of participation shall be deemed adequately complied with if and

Rail labor drafted Section 2 First and 6 of the Railway Labor Act with the express intent of codifying this fundamental principle that employees be consulted before management takes any action which would adversely affect their rates of pay, rules or working conditions. First, Mr. Donald R. Richberg, cousel for rail labor, explained that the duty which is now imposed by Section 2 First, "is the foundation principle of the [proposed] railway labor act." *Hearings on S. 2646, supra*, at 17. Next, Mr. Richberg noted that the important controversies between labor and management had grown out of *changes* to existing wages and working conditions sought by the employees or by the managements, and labor's bill addressed that problem by providing (*Hearings on S. 2646, supra*, at 201; emphasis added):

> Now, the proposed bill provides that there shall be no changes without notice. The present Labor Board, in a statement of principles in Decision No. 119, stated, "the right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by the management."
>
> In the rules established in Decision No. 222 by the Labor Board 30 days' notice was required for all changes. Section 9 of the Newlands Act [ch. 6, 38 Stat. 103, 107-08 (1913)] provided that Federal receivers should not make reductions of wages upon less than 20 days' notice of a hearing upon the receivers' petition. The requirement of notice of changes is not unreasonable or new; *it is obviously an essential to peaceful operation under agreements whereby neither party may be suddenly confronted with a peremptory demand for a change*, whereby the fear of such a demand hangs always over the heads of both parties.

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when the representatives of a majority of the employees of each of the several classes directly affected shall have conferred with the management.

Mr. Richberg's statements before the Senate Subcommittee in 1924 also made it clear that Sections 2 First and 6 required advance notice of an intended *change* in collectively established working conditions, even if the change would not *violate* an agreement. As Mr. Richberg explained (*Hearings on S. 2646, supra*, at 20):

> This prohibition against arbitrary action is a clear necessity in founding industrial peace upon contractual obligations. While an agreement is in force, of course, it should not be changed without consent. *If an agreement is about to expire then either party desiring a change should be required to give ample opportunity for negotiation of a new agreement.*
>
> The purpose of this provision is, as you will see, to prevent a situation drifting up to the date of expiration of an agreement and then peremptorily demanding, the one side or the other, a change in the agreement. *Under the provisions of this bill, if either side wants a change, since 30 days' notice must be given if they want a change to take place at the end of the existing agreement, they must start negotiations beforehand.*

If no notice of intended change were given, or if the bargaining process was still underway, the agreement continued, notwithstanding its expiration clause. *Id.* at 22-23.

If there were any questions remaining after the enactment of the Railway Labor Act of 1926 as to whether Sections 2 First and 6 were intended to prohibit unilateral *changes* in collective rates of pay, rules and working conditions, even if those changes did not *violate* an agreement, and even if those changes were the result of a decision by management to change the direction or scope of the business, those questions were laid to rest by Section 2 Seventh of the Railway Labor Act which was enacted as part of the 1934 amendments to that Act. Ch. 691, 48 Stat. 1186.

Although Sections 2 First and 6 were intended to require notice and bargaining before existing rates of pay, rules or working conditions were changed, those obligations were not always complied with when railroads went into the hands of equity receivers, or when railroads made operational changes. *Hearings on H.R. 5500, Before House Committee on Interstate and Foreign Commerce*, 73rd Cong., 1st Sess. at 102 (1933) (Statement of D.R. Richberg). In 1933, Congress addressed those problems.

First, in March 1933 when it enacted various amendments to the Bankruptcy Act of 1898, it included in its railroad reorganization amendment (*i.e.*, Section 77) provisions which "reenact[s] the law that was passed six or eight years ago [*i.e.*, the Railway Labor Act]" and specifically applied those provisions to trustees and federal courts sitting as railroad reorganization courts. 76 Cong. Rec. 5359 (March 1, 1933) (Remarks of Rep. Parker); *see also*, 76 Cong. Rec. at 5119 (Remarks of Sen. Norris) and 5358 (Remarks of Rep. LaGuardia). One of those provisions, Section 77(o),[23] prohibited the trustees or courts, while in possession of the debtor's property, from "chang[ing] the wages or working conditions of railroad employees" except in compliance with the Railway Labor Act. That legislation was specifically intended to *preserve* existing wages, rules or working conditions when a railroad went into reorganization, and to make any proposed change subject to the Railway Labor Act's dispute resolution provisions; it has had that effect. 76

[23] Section 77(o), 47 Stat. at 1481, provides as follows:

> (o) No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees, except in the manner prescribed in the Railroad Labor Act, or as set forth in the memorandum of agreement entered into in Chicago, Illinois, on January 31, 1932, between the executives of twenty-one standard labor organizations and the committee of nine authorized to represent Class 1 railroads.

Cong. Rec. at 5118 (Remarks of Sen. Norris), 5355 (Remarks of Rep. Summers), and 5356 (Remarks of Sen. Blanton); *accord*, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522, 528 (1984).

Less than four (4) months after the 1933 Bankruptcy Act Amendments were enacted, Congress passed the Emergency Railroad Transportation Act of 1933 [hereinafter, "ERTA"], ch. 91, 48 Stat. 211, and required all railroads to comply with Section 77(o) of the Bankruptcy Act. ERTA § 7(e), 48 Stat. at 214.[24] That legislation, including Congress' specific direction that rail labor be included in the consideration of proposed changes in the scope and direction of railroad operations when those decisions would affect employees (§ 7(a), 48 Stat. at 213-14), reflects a clear congressional intent to give rail labor a broad role in entrepreneurial decisions.

In order to meet the financial demands which the Depression placed upon them, many railroads attempted to restructure their systems and coordinate their operations with other carriers. Those actions, of course, affected employees and their existing collective bargaining rights, for as Mr. Richberg explained to Congress while that body was considering the ERTA: "When you consolidate traffic, when you eliminate services, you raise inevitably new questions as to the seniority rights of the men affected and as to the working conditions; and frequently questions as to applications of agreements to the

[24] Section 7(e) provided a follows (48 Stat. at 214):

> Carriers, whether under control of a judge, trustee, receiver, or private management, shall be required to comply with the provisions of the Railway Labor Act and with the provisions of section 77, paragraphs (o), (p), and (q), of the Act approved March 3, 1933, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States'", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto.

payment of wages." *Hearings on H.R. 5500, supra*, at 102. As Mr. Richberg added (*id.*; emphasis added):

> I think the committee will realize that the seniority rights which men gain over 10, 15, 25, 30 years of service are valuable rights that should be preserved. They are the incentives in this industry that keep men in the industry, among other incentives. They are the results of a lifetime of work. They are accumulations just as much as savings. They are protections of a man's livelihood. And to say that those shall be swept aside, *changed and altered* by the arbitrary will of a management without consultation at all with the labor group is in the first place directly in violation of the principle and the letter of the present Federal law, the Railway Labor Act; and in the second place is in violation of any ordinary consideration for the rights of men who work.

To prevent a continuation of the problems which rail labor experienced with carriers who unilaterally coordinated their operations, and to make the proposed legislation, which would give the government the power to *compel* coordinations and other changes in operations, workable, rail labor suggested that unions be consulted by the regional coordinating committees and by the Federal Coordinator *before* ordering coordinations. *Hearings on S. 1580, Before Senate Committee on Interstate Commerce*, 73rd Cong., 1st Sess. at 85 (Statement of D.R. Richberg). Rail labor also requested that the recent "labor" amendments to the Bankruptcy Act be made applicable to all railroads. *Id.* at 105-06; *Hearings on H.R. 5500, supra*, at 108. Those proposals were made in order to "make effective what was considered to be the purpose of the Railway Labor Act" (*Hearings on H.R. 5500, supra*, at 163), which rail labor maintained prohibited what by 1933 had become "quite a general practice in informing the employees by a bulletin [effective immediately and unilaterally] as to what was going to be done, al-

though it made a complete change in working conditions and rates of pay." *Id.* at 162.

Congress enacted the substance of rail labor's proposals when it enacted the ERTA. 77 Cong. Rec. 4256 (May 26, 1933) (Remarks of Sen. Dill); 77 Cong. Rec. 4870 (June 2, 1933) (Remarks of Rep. Cooper).

Because the ERTA was intended to be temporary legislation, the proponents of the 1934 amendments to the Railway Labor Act requested that Congress include the substance of Section 77(o) of the Bankruptcy Act as Section 2 Seventh of the Act. *See, Hearings on S. 3266, Before Senate Committee on Interstate Commerce*, 73rd Cong., 2d Sess. at 13-14 (1934) (Statement of Joseph B. Eastman).[25] As initially proposed by Commissioner Eastman, Section 2 Seventh provided: "No carrier, its officers or agents shall change the rates of pay, or working conditions of its employees, except in the manner prescribed in section 6 and in other provisions of this Act relating thereto." *Hearings on S. 3266, supra*, at 3.

During the hearings before the Senate Committee on Interstate Commerce, the carriers' representative, W.M. Clement, proposed that Commissioner Eastman's language be amended to read as Section 2 Seventh presently does for the following reason: "This is proposed because the working conditions are not defined in the act. They are covered by agreement, and we believe this is a helpful suggestion." *Hearings on S. 3266, supra*, at 65. Mr. Clement also suggested that Section 6 of the 1926 Act be amended to add "in agreements" after the word "change" in the first sentence "for definiteness and clarity." *Id.* at 73.

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[25] Commissioner Eastman was a member of the Interstate Commerce Commission and the Federal Coordinator created by the ERTA. This Court has recognized that Commissioner Eastman was "one of the weightiest voices before Congress on railroad matters . . . ." *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 304 (1954).

Commissioner Eastman stated that the amendments were acceptable to him; the Section 2 Seventh amendment, he stated, was "an improvement, and should be made" (*id.* at 151), and the Section 6 amendment was one he "favored." *Id.* at 155. Congress adopted both modifications.

Thus, the very language of Sections 2 First, 2 Seventh and 6 of the Railway Labor Act, their legislative history, and this Court's decision in *Order of Raiload Telegraphers*, all compel the conclusion that Congress has determined that whenever a carrier intends to take an action that will adversely affect existing, collectively established, rates of pay, rules or working conditions, it must give notice, and it must bargain if requested to do so by rail labor. Petitioner's decision to sell to Railco, therefore, required that it give notice and bargain over the impact which that decision would have on existing rates of pay, rules and working conditions.

II. SINCE THE VERY EXISTENCE OF THE EMPLOYEES' JOBS IS AT THE HEART OF THIS DISPUTE, THE RAILWAY LABOR ACT REQUIRES THAT THESE JOBS BE MAINTAINED UNTIL THE PARTIES HAVE COMPLIED FULLY WITH THE ACT'S MAJOR DISPUTE RESOLUTION PROCESSES

Petitioner P&LE argues that the Railway Labor Act does not restrict management's right during the Act's status quo period, and that unless it has entered into either an express or an implied agreement with rail labor which restricts those fundamental management rights, it may exercise those rights during the bargaining period. *See*, P&LE Brief at 28, 32. Several of the *amici*, including the Solicitor General, but notably not the NRLC, advance similar arguments. Those arguments, however, are fundamentally at odds with the Act's bargaining scheme and have been squarely rejected by this court in *Detroit & Toledo*.

As this Court noted in *Detroit & Toledo*, 396 U.S. at 150, there are three distinct status quo provisions in the Act, Sections 6, 5 First and 10 (45 U.S.C. §§ 156, 155 First and 160), each covering a different stage of a dispute over changes. These provisions, however, must be read in conjunction with the fundamental duty imposed by Section 2 First of the Act, and even though the language varies from section to section, this Court observed that (396 U.S. at 152-53; footnote omitted; emphasis added):

> [W]e believe that these provisions, together with § 2 First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day "cooling-off" period. Although these three provisions are applicable to different stages of the Act's procedures, the interest and effect of each is identical so far as defining and preserving the status quo is concerned. The obligation of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged *those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.*

That interpretation of the Act's status quo obligation clearly requires that more than express or implied *agreements* be preserved, and indeed, requires that the parties not change the actual and objective manner in which they have acted toward each other prior to the time the dispute arose. That construction of the Act, RLEA respectfully submits, is compelled by its legislative history and, in this case, fully supports the lower court's conclusion that the status quo "include[s] the very existence of the workers' jobs." Pet. in No. 87-1888 at 18a.

When the proposed Railway Labor Act was presented to Congress in 1926, both management's and labor's spokesmen informed the Congress that it was their belief

that the proposed legislation could prevent strikes primarily because their bill prohibited either side from doing anything which would bring about an interruption to commerce *until after* they had complied fully with the bill's dispute resolution processes. *E.g., Hearings on S. 2646, Before Senate Committee on Interstate Commerce*, 69th Cong., 1st Sess. at 16 (1926) (Statement of Alfred P. Thom); *Hearings on H.R. 7180, Before House Committee on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. at 92-93 (1926) (Statement of D.R. Richberg). To accomplish that objective, the bill's draftsmen used the broadest phrase possible "to make it clear that the parties were going to wait [before making a change] and give the Government full opportunity to adjust the controversy." *Hearings on S. 2646, supra*, at 88-89 (Statement of D.R. Richberg). That phrase appears in Section 10 of the Act, and provides that "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." 45 U.S.C. § 160.

That phrase clearly restricts management's ability to exercise its related managerial prerogatives during the period that the status quo obligation is invoked, and indeed, that was its intent. As Mr. Richberg explained: "The thought was to include in the broadest way all the factors which contributed to what is commonly called the status quo. In other words, the conditions may depend upon the dispute, whether it is with regard to rules or with regard to wages." *Hearings on H.R. 7180, supra*, at 44. Mr. Richberg added that it would have been fairly easy to use language which would specifically prohibit strikes, but the "freeze" obligation was to apply *equally* to both sides, and that required the use of broader, more general language which, if a "club" was to be swung, would swing "equally on both sides." *Id.* at 55-56. Prior to the Act, rail employees had the *right* to ban together and to collectively withdraw from service to obtain a bargaining proposal (29 U.S.C. § 52), but that would change the "conditions out of which the dispute arose" since, prior to the dispute, the employees "were employed." *Id.* at 56. The same "club" was intended to apply to the carrier, and, thus, even if management had a *right* to take an action, because, for example, the contract had expired, the Act's status quo obligation would prohibit the carrier from taking that action. *Id.* at 56.

When those concepts are applied to this case, it is clear that the actual, objective working conditions and practices which are in dispute in this case are the very jobs which the P&LE employees are performing, as well as their seniority and other contractual rights which have been accumulated over the years. *See*, J.A. at 88. Petitioner's proposed sale to Railco would obviously have *changed* those working conditions and practices in a way which had never occurred before, and indeed, would have effectively terminated jobs and the agreements. Whether that change would also *violate* any contractual right of the employees is immaterial. The crucial question is whether there is a *change* in those working conditions and "established practices;" if there is, then the Act prohibits it, for the Act's status quo obligation looks past the contractual rights of the parties and prevents either side from taking any action which might lead to an interruption of commerce until the Act's bargaining processes have been exhausted.[26] Depriving approximately

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[26] The non-contractual basis of the Act's status quo obligation is apparent when the 1934 amendment to Section 5 First is contrasted with Section 2 Seventh which was also added in 1934. Section 2 Seventh speaks of "rates of pay, rules, or working conditions of its employees, *as a class as embodied in agreements*" (45 U.S.C. § 152 Seventh; emphasis added), whereas Section 5 First precludes changes in the "rates of pay, rules, or working conditions *or established practices* in effect prior to the time the dispute arose." 45 U.S.C. § 155 First (emphasis added). Section 5 First's amendment was added to "plug [the] . . . hole" which was found to exist in the 1926 Act between the status quo period of Section 6 and the

two-thirds of the P&LE employees of employment, and altering the rates of pay, rules and working conditions under which the remaining number would work, clearly would change existing working conditions, for one of the "fundamental" conditions out of which any dispute might arise "is the relationship of the parties . . . ." (S. Rpt. No. 615, 69th Cong., 1st Sess. at 5 (1920)). Such a change is, therefore, prohibited by the Act at this time.

Petitioner's and several of the *amici*'s arguments that the status quo includes all management rights which are not prohibited by an express—*i.e.*, written—or an implied agreement, was presented to this Court in the *Detroit & Toledo* case, and as respondent indicated above, was squarely rejected. Indeed, petitioner and several of the *amici*, including the United States and Air Con, are asking this Court to adopt Justice Harlan's *dissent* [27] that the status quo includes only those working conditions and practices about which "there is a basis for implying an understanding on the particular practice involved" 396 U.S. at 160 (Harlan, J., dissenting). That consensual test was rejected by this Court in 1969 as being too narrow.

creation of the Emergency Board under Section 10, which triggered the third status quo period. *See, Hearings on S. 3266, supra,* at 21 (Statement of J.B. Eastman). For an example of the need for the thirty (30) day "cooling-off" period in Section 5 First, *see,* Annual Report of the United States Board of Mediation for Fiscal Year Ended June 30, 1931 at 19-28.

[27] Air Con asserts that Justice Harlan's view of the Act's status quo obligation was a concurring view (Air Con Brief at 16); that is clearly incorrect, for Justice Harlan concurred with the majority in concluding that the status quo obligation may freeze "de facto conditions of employment" (396 U.S. at 159 (Harlan, J., concurring)), but "departed" from the majority by asserting that the freeze applied solely to those working conditions where "there is a basis for implying an understanding on the particular practice involved"—*i.e.*, "implied agreements." *Id.* at 159-60 (Harlan, J., dissenting).

In *Detroit & Toledo*, the railroad proposed establishing "outlying work assignments" for certain operating employees—*i.e.*, changing the location at which those employees reported for work—and the union responded by seeking to negotiate an agreement to cover the working conditions at that new reporting location. 396 U.S. at 144-45. While that dispute was pending before the NMB, the railroad decided to establish two new outlying assignments at a different location and subsequently withdrew its earlier proposal; the union, in turn, withdrew its Section 6 proposal and, instead, pressed a claim before an adjustment board that the outlying assignment was prohibited by the existing agreements. *Id.* at 145. The Special Board of Adjustment which heard the union's challenge ruled that: "There is nothing in the rules of agreement which preclude this carrier from establishing an outside assignment" (Appendix in Sup. Ct. No. 29, 1969 Term, at 110), and the carrier then decided to revive its original plans. The union responded by serving a new notice under Section 6 of the Act to revise the agreements to forbid the carrier from making any outlying assignments. 396 U.S. at 146. While the union's Section 6 proposal was pending, the carrier announced that it would implement its changes and the union threatened to strike; the carrier responded by seeking a strike injunction and the union countered by seeking a status quo injunction. *Id.*

In its briefs to this Court, the railroad argued that it had the right to implement the change during the Act's status quo period, because the status quo applied solely to agreements, either express or implied. *E.g.*, Reply Brief for Petitioner at 6, *Detroit & Toledo, supra*; Brief for Petitioner at 28-45, *id.* According to the Detroit & Toledo, since the union had never bargained for and obtained an agreement limiting its right to make outlying assignments, it should not be able to achieve that result merely by serving a Section 6 notice proposing

such a change. Brief for Petitioner at 41, *Detroit & Toledo*. To support its arguments, the railroad relied heavily upon *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942),[28] as does Air Con in this case. Air Con Brief at 16.

This Court rejected those arguments, for it concluded that even though the applicable collective bargaining relationship did not prohibit the Detroit & Toledo from making the outlying work assignment, the Act's status quo obligation did. As this Court explained (396 U.S. at 154; footnote omitted):

> Here, . . . the dispute over the railroad's establishment of the [outlying] . . . assignments arose at a time when actual working conditions did not include such assignments. It was therefore incumbent upon the railroad by virtue of § 6 to refrain from making outlying assignments at Trenton or any other place in which there had previously been none, regardless of the fact that the railroad was not precluded from making these assignments under the existing agreement.

When the principles of that case are applied here, it becomes clear that appellant P&LE is simply wrong in

[28] Respondent RLEA respectfully submits that *Williams*, which involved essentially a question of whether Section 6 applied to "individual contracts of employment," was implicitly overruled by this Court's subsequent decisions in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), and *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944), which, we submit, prohibit individual employment contracts negotiated in the face of the duty to bargain collectively. But as this Court noted in *Detroit & Toledo*, it did not have to "comment upon the present vitality of either of the[] grounds . . . [upon which *Williams* was decided, for] it is readily apparent that *Williams* involved only the question of whether the status quo requirement of § 6 applied at all." 396 U.S. at 158. As in *Detroit & Toledo*, this case involves the question not decided in *Williams*, but decided in *Detroit & Toledo*—*i.e.*, what is the *scope* of the status quo obligation *once it is triggered*.

asserting that because the collective bargaining agreements do not prohibit it from selling its rail properties, it may do so, and do so in a manner which *changes* existing agreements affecting rates of pay, rules and working conditions, notwithstanding the fact that it has not complied with its bargaining obligations under the Railway Labor Act. Like the factual situation in *Detroit & Toledo*, the actual, objective working conditions in effect here do not include the changes which the P&LE is implicitly proposing and which are currently the subject of rail labor's negotiating efforts. Thus, even though the current agreements may not prohibit appellant from selling its rail properties, the Railway Labor Act's status quo requirement does prohibit the carrier from selling in a way that terminates the existing collective bargaining agreements and employment relationships.

Respondent RLEA respectfully submits that the *Detroit & Toledo* decision recognizes the important role which the Act's status quo requirement serves,[29] while at the same time it does not allow rail labor to create a right which it did not previously enjoy simply by serving a Section 6 proposal. If a *practice* has existed "for a suffi-

[29] As this Court explained in *Detroit & Toledo*, 396 U.S. at 150:

> The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

cient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions" (396 U.S. at 154), that conduct would not be barred by the service of a Section 6 notice. *E.g., Baker v. UTU*, 455 F.2d 149, 157 (3rd Cir. 1971. Moreover, where an agreement *clearly* covers a particular situation, and there is no dispute over its application, serving a Section 6 notice to change that agreement does not prevent the carrier from acting pursuant to that agreement.[30]

However, when the carrier seeks to do something which it has never done before, or when circumstances have changed to such a degree that what was once a tolerable working condition because of the changed circumstances, has become intolerable, "it is absolutely essential that the status quo provisions of the Act apply to that working condition if the purpose of the Act is to be fulfilled." *Detroit & Toledo*, 396 U.S. at 155. As the Court explained (*id.*; footnote omitted):

> If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively.

This Court's decision in *Detroit & Toledo* is clearly the required interpretation of both the literal language and the intent of the Railway Labor Act's status quo obligation. If that Act is to continue to apply *equally* to both labor and management, it is essential that its status quo obligation prohibit both sides from altering the *actual, objective* working conditions and practices, *broadly conceived*, which were in effect when this dispute arose—

[30] *See, Rutland Ry. v. BLE*, 307 F.2d 21, 44 n.11 (2d Cir. 1962) (Marshall, J. dissenting).

i.e., P&LE employees must continue to be able to work under their agreements.[31]

III. THE ICC'S JURISDICTION OVER RAIL LINE SALES DOES NOT RELIEVE A RAIL CARRIER PARTICIPATING IN SUCH A SALE OF ITS OBLIGATIONS TO ITS EMPLOYEES UNDER THE RAILWAY LABOR ACT, FOR THAT LABOR STATUTE AND THE INTERSTATE COMMERCE ACT REGULATE ENTIRELY DIFFERENT AREAS OF CONDUCT

Petitioner, respondent ICC, and the *amici*, except for the United States, assert that the ICC's exclusive jurisdiction over rail line sales operates to override whatever obligations the Railway Labor Act might have otherwise imposed on the P&LE to bargain with its employees over the impact of the sale to Railco on their rates of pay, rules and working conditions. Respondent RLEA respect-

[31] The United States suggests that a remand is necessary to determine what the parties' respective rights are during the status quo period, and it adds that if there is a disagreement, that dispute would be a "minor" dispute subject to the exclusive jurisdiction of the adjustment boards. U.S. Brief at 26-27. Respondent RLEA disagrees with both assertions. First, there can be no question in this case, that this dispute arises from the P&LE's plan to sell its rail lines in such a manner that existing agreements will end. The jobs of the employees, their seniority rights, and their agreements, are clearly "conditions out of which the dispute arose," and thus, a sale without preserving the existing jobs, seniority, and agreements would change those actual, objective working conditions. This is exactly what the lower courts concluded, and, therefore, no remand is necessary.

A second problem with the Government's position is that any dispute over what constitutes the status quo is not a contractual dispute, for it is not the parties' agreements, but rather, the actual, objective manner in which they have acted which must be preserved, insofar as those conditions are related to or involved in the dispute. Consequently, the adjustment boards have no jurisdiction to decide those issues. *E.g.*, 45 U.S.C. § 153 First(i); *Transportation•Communications Employees Union and Atlantic Coast Line R.R.*, 170 N.R.A.B. Dec. (Third Div.), 1, 13 (1968) (Referee Kenan).

fully submits that petitioner's, respondent ICC's, and their supporters' arguments are without merit, for the Railway Labor Act and the Interstate Commerce Act are not in conflict and can be read so as to give effect to each. Indeed, the two Acts are part of a harmonious, integrated scheme of regulation which Congress has crafted over the past century to ensure that this country enjoys uninterrupted, efficient rail service. Both Acts provide independent forms of regulation which, when viewed together, are *equally* important to the success of the overall regulatory scheme. Consequently, RLEA respectfully submits, neither Act overrides the other.

A. Both Statutes Are An Exercise Of Congress' Exclusive And Plenary Power To Regulate Interstate Commerce Which, Together, Form An Integrated, Harmonious Regulatory Scheme

Congress has long been aware that rail transportation is important to the economy and welfare of the nation, and for more than a century it has exercised its powers under Article I, Section 8, clause 3 of the Constitution of the United States to regulate commerce "among the several States" by regulating rail transportation. That regulation has taken many forms, including the Interstate Commerce Act which regulates transportation by, among other carriers, railroads (49 U.S.C. § 10501(d)), and the Railway Labor Act which regulates rail labor relations. Since both of those Acts are exercises of Congress' power to regulate interstate and foreign commerce, they are exclusive and plenary exercises of that power, preempting all inconsistent state laws. *Compare, UTU v. Long Island R.R.*, 455 U.S. 678, 682-83 (1982), *with, Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981).

However, contrary to petitioner P&LE's and the ICC's position, the transportation statute does not supersede the labor statute, for as respondent shows below, there is

no irreconcilable conflict between the two statutes. *See, Watt v. Alaska*, 451 U.S. 259, 267 (1981); *see also, United States v. Fausto*, Sup. Ct. No. 86-595, decided January 25, 1988 at 13-14. The only conflict to which the P&LE and ICC can point is one of their own making, for they believe that the ICC is a labor board, with the power to resolve labor disputes. That, belief, however, is erroneous, for the Commission was not "designed or intended [by Congress] to serve as a repository for labor disputes." S. Rpt. No. 459, 88th Cong., 1st Sess. at 9 (1963).

When the histories of both Acts are examined, it becomes clear that Congress has viewed the two statutes as regulating different, albeit related, forms of conduct. This fact is evident throughout almost a century of side-by-side regulation, where Congress has essentially kept the ICC divorced from *resolving labor disputes*.[32] Moreover, Congress has considered both forms of regulation to be essential to its primary goal of providing an efficient rail transportation system.

When the railroads were being returned to private control after the first World War, Congress considered widely varying plans to restructure its overall rail regulation (*see*, THE RAILROAD LABOR BOARD at 77, 83), and eventually enacted the Transportation Act of 1920, *supra*. That Act substantially modified the Interstate

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[32] Perhaps the reason for the Commission's recent foray into labor relations regulation is its mistaken belief that the "ICA has more indicia consonant with a labor statute than the RLA." ICC Brief at 31 n.22. That statement shows conclusively the fact that the ICC lacks any expertise in this area of regulation, for the ICC fails to appreciate the difference between employee welfare—*i.e.*, "minimum standards"—and labor relations—*i.e.*, "collective bargaining"—legislation. *E.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. ——, 107 S.Ct. 2211, 2222 (1987); *Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1943).

Commerce Act to regulate for the first time rail sales, abandonments, extensions and consolidations, among other matters. 41 Stat. at 474. That bill also built upon almost four decades of legislation dealing with rail labor disputes, and created the Railroad Labor Board which was to hear and, "with due diligence," *decide* in a non-enforceable manner, rail labor disputes. Transportation Act of 1920, § 307(a), 41 Stat. at 470; *Pennsylvania Railroad System v. Pennsylvania R.R., supra.*

For a variety of reasons, the Labor Board proved ineffective at preventing threatened interruptions to rail commerce. L.K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 576 (1937); THE RAILROAD LABOR BOARD at 386-93. Rail labor then drafted a bill which drew upon the lessons of past decades and devised a statutory scheme to prevent interruptions to commerce, not by legislating a settlement to disputes, but rather, by providing for effective collective bargaining to enable the parties to devise their own settlements. THE RAILROAD LABOR BOARD at 407-14. As shown above, that dispute resolution process became the Railway Labor Act of 1926, which, with but a few modifications, remains as the governing labor law for the rail industry.

At the same time that Congress was regulating rail labor relations, it was also regulating rail *economic* matters, first with respect to rates (Act of February 4, 1887, ch. 104, 24 Stat. 379) and then gradually with respect to rail corporate decisions. *E.g.*, Title IV of Transportation Act of 1920, *supra*. That regulation became emore extensive with each subsequent legislaive initiative (*e.g.*, Transportation Act of 1940, ch. 722, 54 Stat. 898), until finally Congress reversed that trend and began to "deregulate" with the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter, "4R Act"], Pub. L. No. 94-210, 90 Stat. 31.

That trend culminated in the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.

Petitioner and the ICC are quite correct in observing that Congress, since 1920, has given the interests of employees careful consideration whenever it made extensive revisions to the Interstate Commerce Act. But what petitioner, the ICC and their supporters fail to appreciate is that Congress has not given the ICC the authority to regulate or, as relevant here, *to deregulate rail labor relations—i.e.*, the collective bargaining process. Rather, Congress, the ICC,[33] and this Court,[34] have recognized that the "just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national [transportation] policy . . . , has [a] . . . bearing on the successful prosecution of that policy and [a] . . . relationship to the maintenance of an adequate and efficient transportation system." *United States v. Lowden*, *supra* note 34, 308 U.S. at 234. Indeed, as this Court added in *Lowden*, 308 U.S. at 235-36:

> The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

Thus, in order to ensure that the *public interest* in efficient and reliable rail transportation is not frustrated due to the failure of a carrier to provide for the fair and equitable treatment of all of its employees, both represented and non-represented, Congress has mandated

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[33] *See, St. Paul Bridge v. Terminal Ry.—Control*, 199 I.C.C. 588, 595 (1934).

[34] *United States v. Lowden*, 308 U.S. 225 (1939).

that the ICC consider the interests of employees as an essential part of that public interest. 49 U.S.C. § 10101a (12), 11344(b)(1)(D). Moreover, Congress has both authorized and, in some cases, mandated that the Commission impose a fair arrangement to protect the interests of employees who may be affected by corporate restructurings. *E.g.*, 49 U.S.C. §§ 10901(c)(1)(A)(ii), 10903(b)(2), and 11347.

This form of legislation, establishing minimum public interest standards, stands in stark contrast with the Railway Labor Act which, although it has a common goal of preventing interruptions to commerce, does not concern itself with the equities of the solution reached through collective bargaining. As this Court explained in *Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen*, *supra* note 32, 318 U.S. at 6 (footnote omitted):

> The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions as such. . . . So far as the Act itself is concerned, these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. . . .

There is, of course, a fundamental relationship between the two forms of legislation—minimum standards legislation and collective bargaining legislation—for Congress in the minimum standards legislation has established the "floor" with which all carriers must comply; such legislation does not establish a "ceiling" above which the parties may not bargain. Moreover, that legislation establishes the fact that this subject matter covered by the minimum standards legislation is *bargainable*. As this Court observed in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, *supra*, 362 U.S. at 336-38, the scope of bargaining in the rail industry over corporate restructuring decisions which effect employees is inextricably entwined with Congress' legislation establishing minimum public interest standards. Indeed, respondent RLEA respectfully submits, each form of regulation has had an important impact on the other. Moreover, when this relationship is examined, it is clear that Congress has devised its minimum standards legislation to *supplement, not supersede*, the labor statute, for Congress and the ICC have relied upon the collective bargaining process to *implement* those minimum standards.

This complimentary relationship between the two forms of regulation existed virtually from the passage of the first bill fixing minimum standards—the ERTA in 1933. Congress, as explained above at pages 33-35, incorporated into Section 7 of that Act, the notice, bargaining and status quo features of the Railway Labor Act (*see*, 48 Stat. at 213-14), and also included both a freeze on employment levels and monetary protections for adversely affected employees. ERTA, § 7(b), (d), 48 Stat. at 214. When the authority conferred by that legislation on the Federal Coordinator was about to expire, rail labor negotiated with most carriers the Washington Job Protection Agreement of 1936. *See, Order of Railroad Telegraphers*, 362 U.S. at 337-38; 2 *Hearings on Omnibus Transportation Bill: Before House Committee on Interstate and Foreign Commerce*, 76th Cong., 1st Sess. at 1720-22 (1939) (Statement of Joseph B. Eastman). That agreement, which is still in effect and became the model for subsequent protective arrangements in this industry (*see, New York Dock Ry. v. United States*, *supra*, 609 F.2d at 86-90), was clearly built upon the principle that the labor statute's notice, bargaining and status quo obligations applied to the corporate transactions which were the subject of that agreement—*i.e.*, "coordinations—and,

in Sections 4 and 5 of that Agreement,[35] modified those statutory requirements for coordinations by agreeing to the compulsory arbitration of disputes over the "selection and assignment of forces." That arbitration agreement was not open-ended, however, for labor made it clear during the bargaining process for the agreement that "no change in seniority rules or practices on the roads can be brought about by this agreement; that the management and the committees on the roads are the only parties who can modify the schedules [*i.e.*, agreements on rules and working conditions]." Appendix C at 21a.

That collective bargaining agreement became the minimum standard, first as imposed by the ICC in the exercise of its discretion (*see, United States v. Lowden, supra*), and then as required by the Congress in the Transportation Act of 1940 to be imposed in all consolidation cases. 54 Stat. at 906-07. When the Commission failed to adequately implement the 1940 Act, rail labor first enforced the Interstate Commerce Act (*e.g., RLEA v. United States*, 339 U.S. 142 (1950)) and then began to negotiate new arrangements which applied more appropriately to the changing times. *E.g., Pennsylvania R.R. Co.—Merger—New York Central R.R. Co.*, 347 I.C.C. 536, 538-39 (1974), *Seaboard Coast Line R.R. Co.—Merger—Piedmont & Northern Ry. Co.*, 334 I.C.C. 378, 384-86 (1969); *Duluth, South Shore & A.R.R.—Merger*, 312 I.C.C. 341, 356-57 (1960); and *Norfolk & Western Ry. Co.—Merger*, 307 I.C.C. 401, 439-40 (1959).

Those new arrangements, as did the Washington Agreement, followed the Railway Labor Act's status quo

[35] A certified copy of that Agreement was lodged with the appellate court during its consideration of No. 87-1888, and respondent has reproduced Sections 4 and 5 of that Agreement as Appendix C to this brief. Respondent has also included as part of Appendix C excerpts of the Journal of Proceedings which the carriers' representatives made of those negotiations; a full copy of that Journal will be lodged with the Clerk of this Court. Those excerpts show that it was *not* the intent of Sections 4 and 5 and any arbitration under Section 13, to alter existing agreements.

provisions and preserved existing rates of pay, rules, and working conditions; they, however, expanded on the Washington Agreement by giving the employees life-time job guarantees in return for allowing the carrier to alter the status quo by moving work from one carrier to the other. *E.g., Penn Central—Merger, supra*, 347 I.C.C. at 538-39.

When the ICC failed to adjust its protective arrangements to reflect the advances in the industry, rail labor returned to Congress and when Congress enacted the 4R Act, it required the Commission to increase the levels of protection which it routinely imposed on corporate restructurings. *E.g., Hearings on Railroads, Before Subcommittee on Surface Transportation of Senate Committee on Commerce*, 94th Cong., 1st Sess. at 1105-07 (1975) (Statement of William G. Mahoney); H. Rpt. No. 94-725, 94th Cong., 1st Sess. at 76 (1975) ("If we are to have a fair rationalization of the rail system in the United States, then adequate protection of jobs must be afforded those who choose a career in railroad jobs"). Consequently, it is simply erroneous for petitioner and the ICC to state that, for the past fifty (50) years, rail labor has looked exclusively to the ICC to protect the interests of employees. *E.g.*, P&LE Brief at 37.

As a result of the complimentary nature of the Railway Labor Act and the ICC's minimum standards responsibilities, rail restructurings, until 1983, developed in this industry on the concept that the established rates of pay, rules and working conditions must be preserved by the carriers when they effectuate a corporate restructuring.[36] This is entirely consistent with both the transportation statute and the labor statute, for so long as the carrier does not *change* existing, collectively established, rates of

[36] *See generally, Republic Airlines, Inc.*, 8 N.M.B. No. 49, 54 (1980) ("[A] long history of mergers and acquisitions has resulted in numerous [parent-subsidiary and brother-sister] . . . relationship[s]. Even in merger cases, railroads have continued to operate as separate carriers"); and Resp. App. C at 20a-21a.

pay, rules and working conditions, the Railway Labor Act *does not* interfere with the corporate restructuring.

This relationship between the two Acts was codified by Congress when in 1976 it amended what is now Section 11347 to require the ICC to adopt a protective arrangement that is "at least as protective of the interests of employees who are affected by the transaction [being approved by the Commission] as the . . . terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. § 565)",[37] Congress has required the Commission to adopt protective "terms" which provide "for (1) the preservation of rights, privileges, and benefits . . . to [affected] . . . employees under existing collective-bargaining agreements or otherwise; [and] (2) the continuation of collective-bargaining rights . . . ." 45 U.S.C. § 565(b)(1) and (2). If collective bargaining agreements and rights are to be preserved by all ICC orders to which those mandatory protections are imposed, it is impossible to assert that there is a conflict between the ICC's order and the Railway Labor Act which would justify the overriding of one of the two statutes.

Petitioner and the ICC ignore this integral relationship between the Railway Labor Act and the minimum standards features of the transportation statute, and instead argue that Congress has given the ICC exclusive jurisdiction over *all* aspects of rail line sales, including labor relations matters. Those arguments, however, do not withstand even a cursory scrutiny, for Congress has long recognized that rail labor should have a right to devise its own solutions to the impact of ICC regulated transactions on employees. This, however, does not remove the ICC from the picture, for the ICC always retains the right to review that negotiated solution to determine if it renders the transaction inconsistent with

[37] 49 U.S.C. § 11347, added by Section 402(a) of the 4R Act, 90 Stat. at 62.

the public interest. *Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37 (1971). Indeed this relationship between the two Acts began in 1926, and has not been changed by Congress since that time.

When the proposed Railway Labor Act was being considered in 1926, its opponents in Congress attempted to add an amendment which would have given the ICC the power to suspend any wage agreement which, in the Commission's "opinion," would have involved "an increase in wages or salaries as not to be in the public interest." 1 HISTORY OF THE RAILWAY LABOR ACT OF 1926 at 89 (ABA 1988). That proposed amendment went on to provide that the ICC should thereafter determine whether the agreement should be allowed. *Id.* at 89-90. That amendment was rejected by the committees considering the proposed legislation, for as the Senate Committee on Interstate Commerce explained:

> [T]here is an objection, which the committee deems conclusive, to giving the Interstate Commerce Commission jurisdiction over agreements as to wages. That, in the committee's opinion, would involve the commission in a field of fierce controversy, which might, and probably would, impair its usefulness.
>
> Undoubtedly, under section 15a of the interstate commerce act, the Interstate Commerce Commission has jurisdiction, in fixing rates, to examine into the carriers' expenditures of all sorts, and not to increase rates to provide for extravagant expenditures, whether for labor or for any other purpose.

S. Rpt. No. 606, 69th Cong., 1st Sess. at 5-6 (1926). That amendment was offered in both Houses while the bill was being debated, and it was again rejected. *See*, 1 HISTORY OF THE RAILWAY LABOR ACT, *supra*, at 468, 475, 505-12.

This relationship between the two Acts was further emphasized and, RLEA submits, conclusively established, when Congress amended the Interstate Commerce Act in

1940 to provide that the fair and equitable arrangement which it was requiring to be imposed in all consolidation cases, could be established by collective bargaining; as Congress provided: "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representatives of its or their employees." 54 Stat. at 907, adding 49 U.S.C. § 5(2)(f) (since recodified as 49 U.S.C. § 11347). That provision is still a part of the Interstate Commerce Act today.

Petitioner attemps to escape the force of that statutory provision by ignoring it, and by asserting erroneously that Congress rejected a proposal by Commissioner Eastman that the question of the protection of employees be left to collective bargaining. P&LE Brief at 41-42. Petitioner's arguments are frivolous, for the legislative history of the 1940 Act's employee protection feature, including the sentence quoted above, shows that Congress intended that language to mean exactly what it says: *Notwithstanding* any provision of the Interstate Commerce Act, rail labor may require the carrier to negotiate for a protective arrangement which rail labor considers to be fair and equitable.

As initially proposed by Commissioner Eastman,[38] the bill which became the Transportation Act of 1940 did not contain a mandatory employee protection provision, because, as Commissioner Eastman explained:

> Now, when we were drafting the bill to create the Transportation Authority we thought that in view of what the President had said and what the parties had done in response thereto [*i.e.*, negotiate the Washington Job Protection Agreement of 1936], that it had been agreed by those directly concerned that protection of the employees was a matter that could be handled better by negotiation and agreement than by legislation, and that an agreement had been reached which would protect employees.
>
> That was the reason why no provision was made in that bill for such protection. However, so far as the Commission is concerned, if it is thought that the handling of that matter through negotiation and agreement will not fully cover the situation and that legislation is desirable, we have no objections whatever to provisions in the bill which will require employee protection.

[38] *See*, note 25, *supra*.

2 Hearings on Omnibus Transportaition Bill, supra, at 1722 (Testimony of Joseph B. Eastman) (emphasis added). Earlier, George M. Harrison, the Chairman of RLEA and a member of the "Committee of Six" which had been appointed by President Roosevelt to study the rail crises, testified that rail labor was advocating what is now Section 11347 to supplement, *not supersede*, negotiations; as Mr. Harrison testified:

> Well, you might very properly ask the question, If we have such an agreement [*i.e.*, Washington Job Protection Agreement of 1936] why [do] we want to put anything in the law? Well, the reason for it is that about 15 per cent of the mileage of the country refuses to come into the agreement. You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when these changes are made.

1 Hearings on Omnibus Bill, supra, Vol. 1 at 216-17 testimony of George M. Harrison).

That Congress intended ICC-imposed employee protections to be the minimum levels of protection to be avail-

able to employees, and did not intend to supersede rail labor's right to negotiate different protections, should be beyond dispute, for when Representative Lea, one of the Act's managers, explained the result of the Conference at which the Harrington Amendment was modified (*see*, P&LE Br. at 38), Mr. Lea stated that:

> The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection against unemployment for 4 years, but the Commission is not required to give them benefits for any longer period. *If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads*, but this 4-year limitation is established by the pending conference agreement.

86 Cong. Rec. 10178 (August 12, 1940) (Remarks of Rep. Lea) (emphasis added). Representative Lea then concluded (*id.*; emphasis added):

> We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. *We take nothing from labor by this agreement.* We simply write specific provisions that shall be in the order of approval of the Commission, but otherwise we do not tie its hands.

Congress, therefore, clearly intended that the labor statute and the transportation act would complement each other, with rail labor being able to choose whether it would negotiate the protective arrangement, or rely upon the ICC to impose that arrangement. Moreover, until recently, this is the way the ICC itself viewed re-

lationship between the two Acts. *E.g., Southern Ry.—Control*, 331 I.C.C. 151, 169-70 (1967).[39]

Although Congress has recently modified the Interstate Commerce Act to decrease its economic regulation, it has not decreased the minimum standards features of that Act, and, in fact, it has expressly *protected* those features by prohibiting the ICC from using its exemption powers "to relieve a carrier of its obligaiton to protect the interests of employees as required by the subtitle." 49 U.S.C. § 10505(g)(2). Consequently, it is simply contrary to the plain language of the Acts and to their established relationship to now argue, as the P&LE and the ICC do, that Congress has somehow authorized the ICC to relieve a rail carrier of its labor relations obligations.

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[39] In *Southern Ry.—Control—*, 331 I.C.C. at 169-70 (emphasis in original), the Commission stated that:

> [U]nder section 5(2)(f) [now, § 11347], we impose formulae of protective conditions *upon the carriers* seeking specific permissive authority under section 5(2) of the act [now, §§ 11343, *et seq.*], the purpose being to *protect* the interests of employees some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act. Rights obtained by employees under section 5(2)(f) are the minimum protection which an applicant carrier must provide in order to obtain this Commission's approval of its transaction. They are not, however, the maximum rights employees may gain . . . . The rights of railroad employees under their collective bargaining agreements, under the Washington Agreement, and under the protective conditions imposed upon the carriers under section 5(2)(f) are independent, separate, and distinct rights. We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers. The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees.

B. Both Statutes Can Be Read So As To Give Effect to Each While Preserving Their Sense And Purpose

To support their assertion that the ICC's jurisdiction over rail line sales operates to relieve the P&LE of its obligations under the Railway Labor Act to bargain and to maintain the status quo, petitioner and the Commission advance essentially three interrelated justifications. First, and primarily, they assert that Congress intended to give the ICC exclusive jurisdiction over rail labor disputes which may arise from corporate transactions within that agency's economic regulation jurisdiction. Second, they assert that unless the Commission is given such an expansive, all-encompassing jurisdiction, rail labor will be able to frustrate the implementation of the ICC's transportation policy as developed in *Ex Parte 392*. And finally, they argue that their position as to the supremacy of the ICC's powers over rail labor relations has been upheld by a long line of appellate court decisions involving both the Commission and the former Civil Aeronautics Board [hereinafter, "CAB"].

Respondent RLEA respectfully submits that petitioner's and the ICC's supremacy argument is without merit, for they are wrong in asserting that the ICC is a labor board. As respondent has shown above, Congress has given the Commission the responsibility to impose, in certain corporate restructurings, *minimum* levels of benefits for the protection of rail employees who may be affected by those corporate actions. But Congress in the past has expressly refused to give the ICC the power to involve itself in the collective bargaining process as a mediator or as an arbiter of the merits of a bargaining dispute. *E.g.*, S. Rpt. No. 459, 88th Cong., 1st Sess. at 9 (1963).[40] S. Rpt.

[40] In that report, the Senate rejected using the ICC as the body to investigate and report on a long-time "crew consist" dispute by stating (S. Rpt. No. 459 at 9):

> [N]either the Interstate Commerce Commission or the other regulatory agencies other than the National Labor Relations Board, which are, in fact, arms of Congress, are designed or intended to serve as a repository for labor disputes. This Committee has no desire to see a change made in this respect."

No. 606, 69th Cong., 1st Sess., at 5-6 (1926). Petitioner, the ICC and the *amici* can point to no specific congressional grant of authority which alters the truth of Commissioner Eastman's statement in 1934 that his fellow Commissioners "have no jurisdiction over labor matters at all and never have had." *Hearings on H.R. 7650, Before House Committee on Interstate and Foreign Commerce*, 73rd Cong., 2d Sess. at 54 (1934) (Statement of Joseph B. Eastman).

Petitioner's argument that the minimum standards legislation operates as the sole level of protection which Congress intended to be made available for employees (P&LE Brief at 47), falls apart when examined closely. First, in those provisions of the Act where Congress has mandated that the Commission impose employee protections, Congress, through what is now the second sentence of Section 11347, has authorized rail labor to demand that the carrier negotiate. But second, and more important, petitioner's argument, if correct, would mean that Congress has enacted a form of *compulsory* dispute resolution where the carrier proposes the resolution in its application to the ICC, and is given the unreviewable freedom to accept or to reject the Commission's decision. *See, Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151, 158 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). Rail labor's only course of appeal in such a situation would be a petition to an appellate court for review of that decision on an abuse of discretion standard. Such an uneven dispute resolution procedure is contrary to Congress' entire regulation of rail labor relations. *Texas & New Orleans, supra*, 307 F.2d at 157-58.

In 1926, when Congress was faced with the choice of either making the decisions of the Railroad Labor Board enforceable or establishing a procedure for the negotiation, mediation and *purely voluntary arbitration* of disputes, it chose the latter. S. Rpt. No. 606, *supra*, at 3-4; *Hearings on H.R. 7650*, *supra*, at 16 (Statement of Joseph B. Eastman). With respect to disputes concerning *changes*, Congress has not deviated from that choice, except on certain, very limited occasions. *E.g.*, Pub. L. No. 99-431, 100 Stat. 987 (1986). However, each time that Congress has imposed a resolution of a collective bargaining dispute, it has done so only after the collective bargaining process had been fully utilized, but the dispute remained unresolved.[41] Against this background of an almost absolute ban on the compulsory resolution of rail labor disputes involving changes (*see*, 45 U.S.C. § 157 First), it is inconceivable that Congress, without the knowledge of rail labor which has been intimately involved in each major revision to the Interstate Commerce Act (P&LE Brief at 40-43), would have enacted a form of compulsory dispute resolution, especially one as one-sided as the P&LE and the railroads maintain exists today in the Interstate Commerce Act.

Besides being inconceivable, petitioner's argument that the ICC's orders in this case have relieved it of its Railway Labor Act obligations, is also contrary to the well-settled rule of statutory construction that "repeals by implication are not favored" (*Rodriguez v. United States*, 480 U.S. 522, 524 (1987)), and will not be found to exist "unless an intent to repeal is '"clear and manifest."'" *Id.* at 524, *quoting* prior cases. Moreover, federal courts "must read the statutes to give effect to each if we can do so while preserving their sense and pur-

[41] *E.g.*, Pub. L. No. 88-108, 77 Stat. 132 (1963); Pub. L. No. 90-54, 81 Stat. 122 (1967); Pub. L. No. 91-225, 84 Stat. 130 (1970); Pub. L. No. 97-262, 96 Stat. 1130 (1982).

pose." *Watt v. Alaska*, *supra*, 451 U.S. at 267. In other words, one federal stattue will not be viewed as overriding another *unless* such an intent is "clear and manifest" or there is an "irreconcilable conflict" between the two.[42] Neither justification exists here to conclude as the P&LE and ICC have, that the ICC's jurisdiction over rail line sales supersedes the Railway Labor Act.

As we have shown above, there is no "irreconcilable conflict" between the two statutes; indeed, the two are integral parts of an overall regulatory scheme to provide safe, efficient and uninterrupted rail service. The Interstate Commerce Act addresses the economic aspects of a proposed corporate restructuring, while the labor statute addresses the labor relations aspects. While there is an overlap between the two, that overlap is in the form of one statute—the transportation statute—providing the minimum standards that will be imposed *unless* the labor statute achieves a different, more beneficial, result.

Complimentary statutes of this sort are common in the field of labor relations governed by the NLRA (*e.g.*, *Fort Halifax Packing Co. v. Coyne*, *supra*, 107 S.Ct. at 2222-23), although the minimum standard legislation is frequently state legislation. Since that state legislation is enforceable, even in the face of a supremacy argument (*id.*), unless there is a clear congressional intent to the contrary, it is clear that the two forms of legislation are

[42] *United States v. Fausto*, *supra*, does not justify a different analysis here, for petitioner and its supporters are attempting to use a discretionary authority in the transportation statute to override the *express statutory text* of the Railway Labor Act that the P&LE must "exert every reasonable effort" to settle all disputes, and that until that bargaining is completed it may not change the "conditions out of which the dispute arose." *Fausto* actually precludes petitioner's argument, for as this Court noted in that case, where express statutory language is involved, "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change." Slip op. at 13.

viewed by this Court and by Congress as being complementary, and not in conflict.

In this case there is no "clear and manifest" expression of congressional intent to have the transportation statute override the labor statute, and all of the judicial decisions to which petitioner refers to support its argument involved 49 U.S.C. § 11341(a),[43] or a comparable statute,[44] which specifically provides that any carrier participating in "a transaction approved by or exempted by the Commission under this subchapter [*i.e.*, §§ 11341 to 11351]" is "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction" as approved *and conditioned* by the ICC. That specific immunity provision does not apply here, because this case *does not involve* a corporate transaction either approved or exempted by the ICC under subchapter III or Chapter 113. Rather, this case involves a rail exemption under 49 U.S.C. § 10505 to which, the ICC has acknowledged in non-labor cases, Section 11341(a)'s immunity does not apply, even where, but for the rail exemption, the transaction would have been subject to the ICC's approval under Section 11344 of the Act, 49 U.S.C. § 11344. *Ex Parte No. 282 (Sub-No. 9), Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 279 (1985).[45]

[43] Neither of the pre-1976 ICC-related cases upon which petitioner relies (P&LE Brief at 50 n.31) involved an actual conflict between the labor and transportation statutes, and in fact, involved *agreements* which were adopted by the ICC as the protective conditions.

[44] Section 414 of the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, 770, until its modification in 1978 by the Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705, as did its predecessor Section 414 of the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, provided an immunity from all restraining and prohibitory laws in so far as necessary to carry out a CAB merger or control approval. Thus, even though not specifically addressed in the appellate court decisions, Section 414 provided a manifestation of congressional intent on the conflict issue in the CAB order cases.

In essence, petitioner's, the ICC's, and the *amici's* arguments reduce themselves to essentially one cry: Enforcement of the Railway Labor Act frustrates the ICC's decision in *Ex Parte 392*. That argument, however, is without merit, for the only way in which the decisions below can be viewed as being in *conflict* with *Ex Parte 392*, is if *Ex Parte 392* is viewed as relieving the selling rail

[45] *Amicus* Guilford Transportation relies on Section 11341(a) to distinguish its case from the one at bar, but there are two problems with that reliance. First, while Section 11341(a) does refer to exemptions approved under the consolidation subchapter of the statute, that language does not refer to rail exemptions. Rather, it was added by the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102, 1122, at the same time Congress added an exemption provision to Section 11343 for motor carriers, but not rail carriers. *See*, 49 U.S.C. § 11343(e). As Congress made clear in the reports accompanying that legislation, those amendments were not intended to affect the ICC's authority over rail exemptions. H. Rpt. No. 97-780, 97th Cong., 2d Sess. at 56 (1982).

A second problem with Guilford's argument is that even if Section 11341(a) were applicable, it would only immunize Guilford from complying with the labor statute. Section 11341(a) relieves a carrier of restraining or prohibitory laws, but only to the extent necessary to carry out the ICC's order, as conditioned by Section 11347. Since Section 11347 has, from its amendment in 1976, specifically required that the carrier "preserve" rates of pay, rules, and working conditions until changed in accordance with the labor statute (*see, New York Dock Ry.—Control*, 360 I.C.C. 61, 84, *aff'd, New York Dock Ry. v. United States, supra*), there *can* be no conflict between the two statutes. Indeed, as we have shown above, since a carrier can sell, merge or otherwise consolidate without violating the labor statute's status quo provision so long as it preserved existing agreements, there can be no irreconcilable conflict between the two stattues. In fact, up until the time that the ICC in 1983 arrogated unto itself the power of a labor board, no ICC approved transaction was *ever* frustrated by the labor statute. *See, Chicago, St. Paul, Minn. & Omaha Ry.—Lease*, 295 I.C.C. 696, 701-02 (1958).

carrier of its obligations under the labor statute. But as we have shown above, Congress has not given the ICC that authority, and thus, *Ex Parte 392* cannot be read as accomplishing that result. Petitioner P&LE has not been enjoined from selling its railroad operations; rather, it has been enjoined from selling in such a way that the actual, objective working conditions and practices of its employees are changed during the bargaining process.

At the crux of petitioner's and the *amici*'s objections to the decisions below is their belief that enforcement of the Railway Labor Act jeopardizes the *economics* of sales such as the one to Railco, and this, they assert, is contrary to the short line sales policy adopted by the ICC. That argument is meritless. The ICC's short line policy has been so popular because it has been viewed as a way of reducing *labor* costs. *See*, *RLEA v. ICC*, 784 F.2d 959, 974 n.17 (9th Cir. 1986); *Hearing on Short Line and Regional Railroads Before Subcommittee on Surface Transportation of Senate Committee on Commerce*, 99th Cong., 2d Sess. at 17 (1986) (Statement of Heather J. Gradison). Moreover, that policy is not one which has been designed by Congress, but, as ICC Chairman Heather J. Gradison has explained, was a "surprise," and "unexpected gain out of deregulation." *Hearings on Rapid Growth of Short Lines, Before Subcomm. on Transportation of House Committee on Energy and Commerce*, 100th Cong., 1st Sess. at 69 (1987) (Statement of H.J. Bradison); *Oversight Hearings on Staggers Rail Act, Before Subcomm. on Transportation of House Committee on Energy and Comemrce*, 100th Cong., 1st Sess. at 425 (1987) (Statement of H.J. Gradison). Whenever Congress has designed such a program, it has dealt with the employees impact. (*See*, 49 U.S.C. § 10910. Here, however, the ICC has assumed erroneously that it can override the labor statute's regulation of interstate commerce, and it is that error which has resulted in the P&LE's erroneous claim that there is a conflict between the two statutes.

IV. THE STATUS QUO INJUNCTION WAS NOT A COLLATERAL ATTACK ON THE ICC EXEMPTION ORDER, FOR THAT INJUNCTION DOES NOT ENJOIN, SUSPEND OR ANNUL THE EXEMPTION

Petitioner and *amicus* Chicago & North Western Transportation Company argue that the status quo injunction upheld by the Third Circuit is a collateral attack on the Commission's orders because the practical effect of that injunction was to kill the sale to Railco. Those arguments, however, are without merit, for petitioner and the North Western fail to appreciate the fact that the ICC exemption order did not *authorize* the sale, but merely relieved Railco of the need to obtain prior ICC approval before it acquired and operated the P&LE's rail lines. 49 U.S.C. § 10505. Moreover, Railco was not precluded from buying the P&LE's assets, nor was the P&LE enjoined from selling. J.A. at 213.

28 U.S.C. § 2321(a), the statutory provision upon which the P&LE relies to sustain its collateral attack argument, provides in pertinent part that: "Except as otherwise provided by an Act of Congres, a proceeding to enjoin or suspend, in whole or in part, a[n] . . . order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in" 28 U.S.C. § 2341, *et seq.* That provision, however, is not applicable to this case, for RLEA has not asked the lower courts to enjoin, suspend or in any way set aside the exemption order which the ICC had previously issued under 49 U.S.C. § 10505. That order, *i.e.*, *Ex Parte 392*, as exercised by Railco's September 19, 1987 Verified Notice of Exemption, simply *relieved* Railco from the need to seek the prior approval of the Commission under 49 U.S.C. § 10901 before it acquired or operated the P&LE rail lines. *Ex Parte 392*, 1 I.C.C. 2d at 817-18; 49 U.S.C. § 10505(a). While the injunction in this case prohibited the P&LE from selling to Railco in the manner in which it initially proposed,

that injunction clearly did not prohibit the P&LE, or inferentially Railco, from utilizing that exemption if the P&LE was sold in a manner which complied with the Railway Labor Act.

Petitioner seeks to avoid the plain meaning of the language used by Congress in 28 U.S.C. § 2321(a) by asserting that since the *effect* of the injunction was to void the sale, the injunction must be viewed as enjoining or suspending the ICC's exemption. Petitioner's sole support for that assertion is *Venner v. Michigan Central R.R.*, 271 U.S. 127 (1926), and it is misplaced. While *Venner* observed that a "permissive" ICC order was subject to review (271 U.S. at 131), that principle does not allow a railroad to transform an order exempting—*i.e.*, relieving—Railco from complying with the prior approval requirements of 49 U.S.C. § 10901, into an order authorizing the P&LE to violate the Railway Labor Act. Since the ICC order at issue (*i.e.*, *Ex Parte 392*) did not purport to relieve P&LE of its Railway Labor Act obligations, that order is not a bar to a suit to enforce that labor statute. *Central New England Ry. v. Boston & Albany R.R.*, 279 U.S. 415, 418-19 (1929); *Northeast Wisconsin R.R.—Transportation Comm.—Exemption*, ICC Finance Docket No. 30760, served December 22, 1986 at 4.

An additional defect with petitioner's argument is that the ICC's exemption order cannot be viewed as addressing the P&LE's obligations under the Railway Labor Act and thus, the federal court called upon to enforce that labor statute cannot be viewed as lacking jurisdiction to consider the impact of that exemption on the P&LE's obligations under that labor statute. It is well settled that even where a specific immunity provision such as Section 11341(a) applies to the Commission's order, that agency does not have jurisdiction to enforce the "other laws" to which the statute's immunity applies. *McLean*

Trucking Co. v. United States, 321 U.S. 67, 79-88 (1944). Instead, the agency's task is to construe and to comply with its own statute, for that "legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its actions." *Id.* 321 U.S. at 80. Once the ICC has acted and told the applicant for its order what it can do (*e.g.*, *Chicago, St. Paul, Minn. & Omaha Ry.—Lease*, *supra* note 45, 295 I.C.C. at 702), it then is the responsibility of the tribunal called upon to enforce that "other law" to determine if it is enforceable in light of the agency's order. *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 122-23 (1948); *see*, *ICC v. BLE*, 482 U.S. ——, slip op. at 14 n.13 (1987) (Stevens, J., concurring). In determining whether to enforce that other law, however, the tribunal doing so may not order anything that contravenes the ICC's order, *as properly construed*. *Seaboard Air Line R.R. v. Daniel*, *supra*. Since provisions such as Section 11341(a) are essentially "express repealers," the principles applicable to such a provision should also be applicable to an implied repeal claim.

When those principles are applied here, it becomes apparent that the lower courts had jurisdiction to determine the impact of the ICC's actions on rail labor's statutory rights. Moreover, enforcement of the Railway Labor Act cannot be viewed as abridging the ICC's *exemptions* or *approval* orders, for as this Court explained with reference to the Federal Communications Commission: "The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant." *Regents of Georgia v. Carroll*, 338 U.S. 586, 600 (1950).

V. THE INTERSTATE COMMERCE ACT DOES NOT RESTORE TO THE FEDERAL COURTS THE JURISDICTION WHICH CONGRESS HAS WITHDRAWN BY THE NORRIS-LAGUARDIA ACT

Without in any way identifying what specific provision of the Interstate Commerce Act is directed to, and binding on P&LE employees, making it illegal to strike in an effort to require a carrier to bargain over rates of pay, rules or working conditions, petitioner and the ICC nevetheless assert that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, and in particular Section 4 of that Act, 29 U.S.C. § 104, *must* be "accomodated" to the transportation statute to enable the federal courts to enjoin a strike in violation of that transportation statute.[46] That argument, respondent RLEA respectfully submits, is without merit, for as we have explained above, the Interstate Commerce Act is not a labor statute, and thus, the anti-injunction Act's withdrawal of jurisdiction may not be accommodated to that Act.[47]

As this Court has emphasized many times before, Congress, through its passage of the Norris-LaGuardia Act,

[46] Petitioner argues that rail labor's strike was enjoinable as a violation of the Railway Labor Act, but as we have shown above, that assertion is erroneous. Since petitioner failed to comply with its "obligation[s] imposed by law" which are involved in this dispute, and since it failed to make "every reasonable effort to settle" this dispute "by negotiation or with the aid of any available governmental machinery of mediation" (29 U.S.C. § 108), it lacked standing to seek an injunction. *E.g., Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western R.R.*, 321 U.S. 50, 57-58 (1944). That fact also barred the P&LE from seeking an injunction to enforce the transportation statute. *Order of Railroad Telegraphers v. Chicago & North Western Ry., supra.*

[47] RLEA submits that petitioner and the ICC cannot establish that a strike by rail labor would violate the Interstate Commerce Act since the last clause of Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52, specifically immunizes such a strike from being considered as a violation of that transportation statute. *See, United States v. Hutcheson*, 312 U.S. 291, 236-37 (1941)

withdrew from the federal courts jurisdiction to prohibit any person or persons from "[c]easing or refusing to peform any work or to remain in any relation of employment; . . . [g]iving publicity to the existence of, . . . any labor dispute, whether by advertising, speaking, patrolling, . . .; or [a]dvising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified" in "any case involving or growing out of any labor dispute. . . ." 29 U.S.C. § 104(a), (e) and (i). Congress also defined "labor dispute" as used in that Act as including "any controversy concerning terms or conditions of employment . . . ." 29 U.S.C. § 113(c). That Act and its limitations on federal court jurisdiction clearly applies to the P&LE's request for an injunction in this case. *Order of Railroad Telegraphers v. Chicago & North Western Ry., supra.*

Notwithstanding the obvious restrictions of that Act, petitioner and the ICC assert that the Norris-LaGuardia Act must be accommodated to the policies of the Interstate Commerce Act because that statute is a "labor statute" in that it contains "a comprehensive scheme for the resolution of labor protection issues arising out of ICC-regulated transactions." P&LE Brief at 59. Much of what has been said above shows the absurdity of the P&LE's and the ICC's position, for Congress has not made the transportation statute "part of a pattern of labor legislation." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 42 (1957). Instead, the transportation statute and the labor statute are part of a pattern of rail commerce regulation, and as this Court has emphasized before, " 'the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, nonlabor statute' " such as the Interstate Commerce Act. *Burlington Northern R.R. v. BMWE, supra*, 481 U.S. at 435 n.3, *quoting Order of Railroad Telegraphers, supra*, 362 U.S. at 339.

Petitioner's assertion that the transportation statute's "comprehensive scheme" for the resolution of labor disputes arising from ICC-regulated transactions is the type of dispute resolution mechanism to which an accommodation of the anti-injunction Act may be made, is erroneous for another reason as well—it ignores the fact that the ICC's *Ex Parte 392* decision has not channeled the competing economic forces of labor and the P&LE into a "special process" intended to compromise them evenly, and thus, there can not be an accommodation of the labor statute to that process. *Chicago River*, *supra*, 353 U.S. at 40-41. Whether or not the ICC will impose employee protection under Section 10901 does not turn on the importance which rail labor places on such protections, but instead, depends upon whether the ICC, in balancing the public interest factors enumerated in 49 U.S.C. § 10101a, of which rail labor's interests are only one, determines, in the virtually unreviewable exercise of its discretion, that the public interest will be served if those minimum benefits are imposed. If the ICC imposes protections, the carriers have the option of accepting that decision, or cancelling theih sale. Rail labor has no such option.

Moreover, in over a score of cases under Section 10505 exemptions from the requirements of Section 10901, the ICC has not *once* exercised its discretion and imposed protections for employees, and, indeed, has informed the industry that it will not exercise its discretion in favor of labor unless "exceptional circumstances" are shown. *FRVR Corp.—Exemption*, *supra*, Pet. in No. 87-1888 at 113a.[48]

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[48] As the ICC explained in its *FRVR* decision, *supra*, (*id.* at 113a-14a; footnotes omitted):

> The Commission would consider as exceptional, situations in which there was a misuse of the Commission's rules or precedent, or where existing contracts specified that line sales were subject to procedural or substantive protection. Further, the exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales.

As even a cursory examination of the *FRVR* standard shows, the ICC's administration of Section 10901 has relegated rail labor "to a 'small voice of protest' without the possibility of either negotiation or economic self-help." *P&LE I*, Pet. in No. 87-1589 at A-12. This Court has never sanctioned accommodating the policies of the Norris-LaGuardia Act to such an uneven process, and indeed, any such accommodation would be contrary to Section 2 of the anti-injunction statute, which requires that the Act be construed in such a way that the federal *labor* policy is enforced. 29 U.S.C. § 102. This case, therefore, is not one of those "limited circumstances" where the Norris-LaGuardia Act may be accommodated to the transportation statute, even if that statute were, which it is not, a "labor statute." *Burlington Northern R.R. v. BMWE*, *supra*, 481 U.S. at 444-46.

CONCLUSION

For the reasons set forth herein, respondent RLEA respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

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Date: March 3, 1989

APPENDICES

APPENDIX A

Railway Labor Executives' Association
Member Organizations

*American Railway & Airway Supervisors' Association (Division of TCU);

*American Train Dispatchers' Association;

*Brotherhood of Locomotive Engineers;

*Brotherhood of Maintenance of Way Employes;

*Brotherhood of Railroad Signalmen;

Brotherhood of Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

*International Association of Machinists and Aerospace Workers;

*International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

*International Brotherhood of Electrical Workers;

*International Brotherhood of Firemen and Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

*Railroad Yardmasters of America (Division of UTU);

Seafarers International Union of North America;

*Sheet Metal Workers' International Association;

*Tranport Workers Union of America;

*Transportation • Communications International Union (TCU); and

*United Transportation Union.

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* Those RLEA organizations which represent P&LE employees.

APPENDIX B

Constitutional Provision and Statutes Relied Upon

I. United States Constitution, Article I, Section 8, clause 3

[The Congress shall have the power . . .] to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

II. Clayton Anti-Trust Act (Excerpts)

A. Section 20, 29 U.S.C.§ 52

That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dis-

pute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

III. Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (Excerpts)

A. Section 11347, 49 U.S.C. § 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangements may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

IV. Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* (Excerpts)

A. Section 2, 29 U.S.C. § 102

In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of

property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

B. Section 8, 29 U.S.C. § 108

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

C. Section 13, 29 U.S.C. § 113

When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or

more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

V. Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* (Excerpts)

A. Section 2 Seventh, 45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

APPENDIX C

Washington Job Protection Agreement of May 1936 (Excerpts)

* * * *

Section 4. Each carrier contemplating a coordination shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employes of each such carrier and by sending registered mail notice to the representatives of such interested employes. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such coordination, including an estimate of the number of employes of each class affected by the intended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice.

Section 5. Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

* * * *

EXCERPTS FROM WASHINGTON JOB PROTECTION AGREEMENT JOURNAL OF NEGOTIATIONS

NEW YORK CITY—FEBRUARY 3, 1936

MEMORANDUM

Meeting of Committee of Nine with the Labor Executives was held in Room 3040, Grand Central Terminal, New York, commencing at 10.00 A.M.

Present:

Messrs:

H. A. Enochs
Jno. G. Walber
William White

E. J. Connors
C. M. Dukes
C. A. Clements

C. D. Mackay
W. J. Jenks—by G. E. Bruch
C. G. Sibley

Labor Executives Committee:

Messrs:

Geo. M. Harrison—Brotherhood of Railway & Steamship Clerks

A. Johnston—Brotherhood of Locomotive Engineers

D. B. Robertson—Brotherhood of Locomotive Firemen and Enginemen

A. F. Whitney—Brotherhood of Railroad Trainmen

W. D. Johnson—Order of Railway Conductors, representing—J. A. Phillips.

T. C. Cashen—Switchmen's Union of North America

E. J. Manion—Order of Railroad Telegraphers

B. M. Jewell—Railway Employes' Department

J. G. Luhrsen—American Train Dispatchers' Association

F. H. Fljozdal—Maintenance of Way Employees

A. E. Lyon—Brotherhood of Railroad Signalmen of America

H. J. Carr—International Association of Machinists

Roy Horn—International Brotherhood of Blacksmiths, etc.

Roy Westgard—International Brotherhood of Electrical Workers

F. H. Knight—Brotherhood of Railway Carmen of America

J. F. McNamara—Brotherhood of Stationary Firemen and Oilers

W. S. Brown—International Organization Masters, Mates and Pilots of America

—International Marine Engineers' Beneficial Assn.

W. G. Cantley—Statistician—Brotherhood of Railroad Trainmen

Also—

Messrs:

H. E Jones, Asst. Secretary, Bureau of Information of the Eastern Railways.

M. L. Long.

After introductions, Mr. Harrison stated that it was their thought of discussing a proposal which would be in the nature of a substitute for the Emergency Railroad Transportation Act. He stated he was authorized to speak for all of the organizations here represented, which included the Express Agency, Southeastern Express Company and the Pullman Company. He further stated that they were prepared to submit a list of the railroads which they were authorized to represent from the labor standpoint, and suggested possibly that the Committee of Nine would submit such a list. Mr. Enochs informed the Labor Executives that his Committee did not represent the Express Agency, Southeastern Express Company nor the Pullman Company.

It was mutually agreed that arrangements as to the hour for beginning and length of conferences would be mutually agreed to as discussions progressed.

Mr. Harrison then stated that they were prepared to work out an agreement but called attention to the situation in Congress, namely, that this being Presidential year Congressmen were disposed to adjourn at as early a date as possible. As the Emergency Railroad Transportation Act will expire on June 16, 1936 the Labor Executives felt it necessary to have ready a proposed bill for introduction into the Congress in the event that the present negotiations failed of reaching a settlement. Such a bill has not as yet been filed.

It was agreed that any publicity to be given of the meetings would be in language to be agreed upon between Mr. Enochs and Mr. Harrison.

Mr. Enochs then read Mr. Harrison's letter of December 6, 1935 to Mr. Pelley and also Mr. Enochs' letter to Mr. Harrison of January 21, 1936 as placing before the meeting the subject for discussion. Immediately following this, Mr. Harrison handed to Mr. Enochs a copy of a proposal which had been prepared by the Labor Execu-

tives. There followed a general discussion of the proposal—

Paragraph 1—Mr. Harrison explained the intent of this paragraph is to cover various forms of coordination or abandonment of facilities by either a single carrier or two or more carriers. After some detailed discussion, Mr. Enochs called attention to the question of seniority involved in any coordination.

Paragraph 2—Mr. Harrison read this paragraph and explained the intent was to provide that the employees should be no worse off as to compensation in cases of coordination. Question was raised as to whether any of the employees who under this paragraph would receive compensation while unemployed could be used in some other occupation,—for instance—highway crossing watchman, and if so, what seniority questions will arise. Mr. Harrison advised that it was not the intent of the Labor Executives to propose that employees should be placed on jobs where they hold no seniority. He also stated that this question of handling the individuals involved was covered in their Paragraph 5. It was also explained by Mr. Harrison that some of the organizations, namely, Engine and Train Service, have constitutional provisions covering seniority in cases of coordination. The other organizations usually place the authority for handling questions of this sort in the hands of their Grand Lodge Officers.

Mr. Alvanley Johnston of the Engineers stated that his organization would not interfere with the division committees on the various railroads in the handling of seniority, holding that this committee of labor executives cannot enter into agreements involving the handling of seniority.

Mr. Whitney of the Trainmen stated that Mr. Johnston had expressed his organization's position as well. He also called attention to the fact that many mergers had

been consummated in the past, all being done under their respective agreements,—also stating—"We are without authority to flirt with seniority."

Mr. W. D. Johnson, representing the Conductors, stated that their organization had constitutional provisions dealing with this matter and that this committee cannot agree to anything contrary to the seniority provisions as defined by their organization.

Mr. Enochs suggested that possibly we could by discussion arrive at some general principle which would govern in the allocating of employees, calling particular attention to the questions of craft point seniority involving very generally Shop Craft Employees.

Mr. Harrison called attention to the fact that they were making a concession in proposing that employees whose services are not needed due to coordination while so employed should be allowed but two-thirds of their salary, he holding that under the Emergency Act they were now entitled to full salary. He also explained that if any of such employees were called back into service they should receive their full rate of pay. Mr. Harrison further amplified his position by illustrating how his organization would handle a case under this paragraph, first stating that Clerks and Freight Handlers have interchangeable seniority and in the working out of a coordination the junior clerks would bump back to freight handlers and would be paid the difference between their rate as clerks and freight handlers' rate, but the freight handlers displaced from employment would receive two-thirds of their compensation until they may be called back to trucking.

NEW YORK CITY—FEBRUARY 4, 1936.

MEMORANDUM

Meeting of the Committee of Nine with the Labor Executives was held in Room 3040, Grand Central Terminal, commencing at 9.30 A. M.

Present—Same persons as at the meeting on the third, and in addition—

Mr. E. L. Oliver, Director of Research, Brotherhood of Railway and Steamship Clks.

Mr. Enochs referred to the employes' proposal which had been handed to the Committee of Nine at the meeting on the third and in connection with Paragraph 1 stated that his understanding of the employees' proposal at Chicago was that the effect of coordination to be discussed was that caused by the coordination of two or more carriers and that nothing would be done to interfere with the actions of individual carriers. He expressed surprise that the labor executives had presented a proposal which was much beyond the scope as originally discussed at the meeting in Chicago. He questioned whether the railroad executives would have agreed to appointing a committee for the purpose of a general exploration of the subject if they had known it was intended to apply to coordination on individual carriers. He stated that the Committee of Nine cannot agree to consider the effect upon individual carriers.

* * * *

Mr. Enochs called attention to action taken by various industries in making allowances to employees separated from employment and commented that none of these companies had allowed compensation comparable to that which the labor executives had proposed. He also cited examples of railroads which had made allowances, such as the Union Pacific, Baltimore & Ohio, Pennsylvania,—all of these allowances having been based upon the

equities in each case, there being no generally accepted bases. He further stated that no railroad permits the payment of money for services not rendered without authority of the Board of Directors, except in such specific cases as vacations and sick allowances, in which event designated officers are permitted to allow compensation of the Trainmen and Mr. Johnson of the Engineers each stated that they had ample organization laws to cover the situation of merging or abandoning of railroads in dealing with the questions of seniority.

* * * *

Mr. Enochs again called attention to the questions of seniority involved in this matter, making the point that seniority is primarily of interest to the employees and the leaders of these organizations must assume their leadership to see that all of the employees they represent are accorded all seniority rights due them.

* * * *

The question was raised as to how the seniority questions should be handled particularly in the case of shop craft employees who have craft point seniority and Mr. Harrison stated that this was a question which must be dealt with by the organizations.

Mr. Jewell then stated that prior to Federal Control his organizations had dealt with mergers involving seniority along the general policy that the individuals concerned follow the work and that such was their policy today. They have in some instances merged seniority rosters but the international officers have not dealt with seniority mergers along one general policy on account of company unions. He felt that so far they have met the situation in a fair and equitable manner but that if an agreement is reached here his organization will attempt to formulate some policy to be followed.

WASHINGTON, D.C., MAY 11, 1936

Meeting was held with the Labor Executives in Room 1030, Transportation Building, Washington, D.C. at 10.50 A.M.

PRESENT:

Messrs.

H. A. Enochs
H. A. Benton
G. E. Bruch
C. A. Clements
E. J. Connors
C. M. Dukes
J. B. Parrish
William White

E. M. Davis
G. W. Knight
J. M. Souby

H. E. Jones
M. L. Long
Ed. Murrin

Labor Executives:

G. M. Harrison—Brotherhood of Railway & Steamship Clerks

W. D. Johnson—Order of Railway Conductors

S. R. Harvey—Brotherhood of Railroad Trainmen

Mr. Burke—Brotherhood of Locomotive Engineers

D. B. Robertson—Brotherhood of Locomotive Firemen & Enginemen

F. H. Fljozdal—Brotherhood of Maintenance of Way Employees

A. E. Lyon—Brotherhood Railroad Signalmen of America

J. G. Luhrsen—American Train Dispatchers' Assn.

B. M. Jewell—Railway Employees' Department, AF of L

A. L. Jones—National Marine Engineers' Beneficial Assn.

Mr. Obie—Order of Sleeping Car Conductors

* * * *

In connection with Section 5—Mr. Harrison stated that no definite formula could be used for the assignment of men in coordinated operations but it was the thought of the labor executives that the assignment and placement of employees would be the subject of an agreement in each particular case. He further stated in cases where on one railroad involved in a coordination and employees are represented by the organizations, parties to the agreement and another railroad involved in the coordination the employees are not represented by the organizations, parties to the agreement, that the employees will be governed by the agreement as to assignment of employees made by the organization party to the agreement.

Mr. Enochs pointed out a conflict between Sections 3 and 5, commenting that under the language used in Section 5 the organizations here represented make the agreement whether they represent the employees or not. Mr. Harrison stated the agreement applies only to the extent the organization represents the employees. Mr. Enochs then read a portion of Section 3 which stated that a coordination involving a carrier or carriers, parties to the agreement with a carrier or carriers, not parties to the agreement, will be made only upon the basis of an agreement approved by all of the carriers, parties to the

coordination and all of the organizations of employees involved.

* * * *

In connection with Section 5, Mr. Enochs asked that if in case an agreement as to the assignment of men is not reached whether this would be handled as a dispute under Section 13 and Mr. Harrison replied in the affirmative. It was pointed out that Section 13 as written did not provide for the handling of disputes or matters covered by Section 5.

* * * *

There was general discussion as to methods used in determining the placement of men in coordinated operations. Mr. Robertson citing particularly the experience of the organizations on the Canadian National, expressing the thought that no particular method should be laid down in the agreement because each coordination must be handled in a different manner. Mr. Enochs stated the desire of the conference committee was to secure the assistance of the executive officers of the organizations in having the local representatives of the organizations make agreements with the managements so that the benefits of the general agreement would accrue uniformly and in a fair manner to the employees affected.

* * * *

Mr. Enochs stated that the carriers are interested in securing qualified employees to do the work and Mr. Harrison stated that the assignment of men is covered by regulation agreements and if employees are qualified and have necessary seniority they must be assigned to the jobs.

After some further discussion as to the meaning of Section 5, Mr. Harrison stated that the labor executives will suggest a change in the language.

* * * *

Section 13—Mr. Enochs suggested that this section should be made a portion of the first sentence of Section 12 of the Joint Conference Committee's proposal and rearrange the language of Section 13 of the labor executives' proposal. He also called attention to the fact that no provision is made to cover the expenses of arbitration. Mr. Harrison explained it was the intent in this connection to have a similar arrangement for paying expenses as outlined in their Section 10(d), dealing with property losses. He pointed out that the proposal of the conference committee will also bring for review of the joint committee proposed in Section 13 local agreements covering coordinations. Mr. Enochs voiced the opinion that there should be some control by the parties who negotiate the agreement in order that it might be uniformly applied. Mr. Harrison stated he personally was not opposed to this suggestion but the labor executives would consider the matter. Mr. Robertson stated that it must be understood that this committee of eight provided for by Section 13 would not be permitted to interfere with agreements between the organizations and the individual roads. It was pointed out that cases might arise where the local parties might not make an agreement and Mr. Enochs expressed the thought that it would be necessary for the labor executives to police the matter in order to make effective the general agreement covering coordinations.

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It was suggested that possibly in case of failure to reach agreement by the two parties that three neutrals be selected instead of one, and Mr. Harrison objected to this, pointing out that experience has shown that two of the so-called neutrals became advocates so that there was in effect but one neutral who eventually decided the issue.

WASHINGTON, D.C., MAY 13, 1936

Meeting was held with the Labor Executives in Room 1030, Transportation Building, Washington, D.C. at 11.00 A.M.

PRESENT:

Messrs.

A. A. Enochs
H. A. Benton
G. E. Bruch
C. A. Clements
E. J. Connors
C. M. Dukes
J. B. Parrish
Jno. G. Walber
William White
E .M. Davis
G. W. Knight
C. C. Handy
J. M. Souby
Ed. Murrin

H. E. Jones
M. L. Long

Labor Executives:

Messrs.

G. M. Harrison—Brotherhood of Railway & Steamship Clerks

W. D. Johnson—Order of Railway Conductors

S. R. Harvey—Brotherhood of Railroad Trainmen

Mr. Burke—Brotherhood of Locomotive Engineers

D. B. Robertson—Brotherhood of Locomotive Firemen & Enginemen

T. C. Cashen—Switchmen's Union of North America

F. H. Fljozdal—Brotherhood of Maintenance of Way Employees

A. E. Lyon—Brotherhood Railroad Signalmen of America

B. M. Jewell—Railway Employees' Department, A. F. of L.

J. G. Luhrsen—American Train Dispatchers' Association

Roy Horn—International Brotherood of Blacksmiths, etc.

Mr. Obie—Order of Sleeping Car Conductors

Donald R. Richberg—Counsel

Mr. Harrison referred to the last conference at which the Joint Conference Committee went over the draft of agreement etc. Mr. Harrison replied that the agreement did not include these services; it applied only to employees covered by agreements and is co-extensive with the schedule agreements.

Section 3. Mr. Enochs stated the conference committee objects to the last clause dealing with corporate organizations, the effect being to bring under the agreement actions of a single carrier. It was also suggested that this subject should be left to the discretion of the Interstate Commerce Commission. Mr. Robertson voiced the opinion that this paragraph was designed to cover cases where two carriers are listed in the agreement each as single carriers but some time later are consolidated by authority of the Interstate Commerce Commission into one carrier. In such cases it was the thought of the labor executives that the agreement would protect the employees. There was a disagreement between Mr. Robertson and Mr. Harrison on this point. Mr. Harrison explained that the purpose of the clause was that if a single carrier, party to the agreement later unifies their

corporate organizations by authority of the Interstate Commerce Commission which resulted in a change in operations, then the agreement would apply, even though the carrier is listed as a single carrier, party to the agreement. He cited as illustrative the Santa Fe and Santa Fe of Texas; the Rock Island and Rock Island and Gulf; Frisco and Frisco of Texas.

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Section 4—No disagreement.

Section 5. Mr. Enochs stated this should be rephrased using part of the proposals of the labor executives and of the conference committee. A clause should also be inserted providing for settling a dispute in case of failure to agree. Mr. Harrison stated there was no objection to this and they proposed rewriting their Section 13 to cover this matter. It was suggested that a time limit be fixed within which agreement must be reached so that the dispute can be forwarded for settlement. Mr. Harrison explained that they had thought a 30-day limit from the time a dispute arises. Question was raised whether the agreement referred to in this paragraph must be in accordance with seniority rules and practices in effect on the home roads and Mr. Harrison replied that no change in seniority rules or practices on the roads can be brought about by this agreement; that the management and the committees on the roads are the only parties who can modify the schedules. He stated that the assignments must be made in accordance with the rules and practices existing on the home roads but the allotments of employees would be in accordance with the agreement reached.

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It was suggested that the words "accepted as appropriate" be used instead of "recognized as appropriate" in the first sentence of conference committee proposed Section 5.

At 12.45 P.M. recess was taken until 2.15 P.M.